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CENTRAL ILLINOIS COMPANY, a
Corporation, JAMES R. BUCK, W. SCOTT
LINN, CHARLES E. GIVAN, DONALD W.
GREEN,

Appellants,

vs.

SEARS, ROEBUCK AND COMPANY, a
Corporation,

Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

288 I.A. 615¹

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

December 31, 1935, plaintiffs filed a complaint consisting of two counts; the first count contained paragraphs numbered 1 to 11; the second paragraphs numbered 12 to 17. In both counts plaintiff, Central Illinois Company, asked judgment in the sum of \$100,000, with interest from July 1, 1932, and the other plaintiffs demanded judgment for \$68,700, also with interest. The basis of the suit was an alleged liability on the part of defendant to pay certain gold notes of a corporation known as the H.P.W. Stores, Inc. Defendant moved to strike count 1, alleging it failed to state a cause of action, and because Exhibit C, attached to the complaint, on which liability was based, did not disclose a promise on the part of defendant to pay the notes, but on the contrary was negative to any such promise. The second count charged the liability of defendant upon the theory that the relationship between the H.P.W. Stores, Inc., and defendant was such that the H.P.W. Stores, Inc., became a mere adjunct instrumentality of defendant corporation, and that the fiction of the corporate entity of the subordinate corporation should be disregarded. Defendant moved to strike this count also because it failed to state that during any of the times complained of the H.P.W. Stores, Inc., had assets in excess of its liability to its bank and merchandise creditors, and therefore in view of express provision of the Gold Notes (a copy of which was attached

2000

1. The first part of the report is devoted to a general survey of the situation in the country. It is based on the data collected during the last year. The second part is devoted to the analysis of the results of the work done during the last year. The third part is devoted to the conclusions and recommendations. The fourth part is devoted to the appendixes. The fifth part is devoted to the bibliography. The sixth part is devoted to the index. The seventh part is devoted to the list of abbreviations. The eighth part is devoted to the list of symbols. The ninth part is devoted to the list of figures. The tenth part is devoted to the list of tables. The eleventh part is devoted to the list of references. The twelfth part is devoted to the list of footnotes. The thirteenth part is devoted to the list of errata. The fourteenth part is devoted to the list of corrections. The fifteenth part is devoted to the list of additions. The sixteenth part is devoted to the list of deletions. 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The hundredth part is devoted to the list of footnotes.

as Exhibit A) the said notes were subordinate to such bank and merchandise creditors, and there was no averment that plaintiff's lost by reason of anything done or omitted by defendant in and about the operation of the Stores. The motion also averred that paragraphs 12 to 16 of count 2 were vague and indefinite and did not state further facts with any degree of particularity, which would require defendant to answer the averments therein contained. Three exhibits were attached to the complaint: Exhibit A showing the form of one of the Five Year 6% Gold Notes; Exhibit B which was an agreement entered into by defendant and plaintiff's predecessors in title on February 20, 1929; Exhibit C, which was a letter dated February 15, 1929, written by the president of the defendant corporation on that date and addressed to James G. Alexander, the then representative of the plaintiff's, and Exhibit D, being an agreement in writing entered into by the parties on December 31, 1929. The motions were sustained. Plaintiff's elected to stand upon their complaint, and judgment for costs in favor of defendant and against plaintiff's was entered, to reverse which the plaintiff's appeal. The question for determination is whether the counts or any one of them state a cause of action.

The first count alleges that plaintiff's or their predecessors in title, on February 20, 1929, owned and held certain Five Year Gold Notes of the H.P.W. Stores, Inc., to the total amount of \$131,364.30, certain common shares of the stock of the same corporation, and certain options for the purchase of additional shares; that on that date the owners entered into the agreement (attached and described as Exhibit B) whereby defendant agreed to lend to the H.P.W. Stores, Inc., \$125,000 in cash, and the owners agreed to assign to defendant all their shares of stock in the corporation, cancelled their options for the purchase of other stock held by them respectively, and expressly waived the payment of any interest

on the Five Year Gold Notes retained by them, up to their maturity on July 1, 1929, and January 1, 1930, further agreeing to extend the time of payment of the principal of said notes until July 1, 1932. The third paragraph of count 1 avers that plaintiffs were induced to agree to these things by the letter of defendant, attached and described as Exhibit C, by which, as plaintiffs aver, it was promised by defendant that if the H.P.W. Stores, Inc., did not pay these gold notes as the maturity thereof as extended, defendant would pay them. The paragraph avers that the transfer of stock, cancellation of options, and extension of the notes was in consideration of this promise of the defendant, that, relying on the promise plaintiffs agreed to the things above recited, the preferred stockholders waived all cumulative dividends on their preferred stock up to and including December 31, 1934, and gave an extension of an option held by Sears, Roebuck & Co., to purchase this preferred stock at prices not in excess of \$80 a share from July 1, 1930, to December 31, 1934.

The paragraph avers that on March 5, 1934, defendant Sears, Roebuck & Co., claiming the H.P.W. Stores, Inc., to be indebted to it in the sum of \$1,076,148, caused all the assets of the H.P.W. Stores, Inc., to be delivered to defendant for a nominal consideration of \$253,424, which was credited on the alleged account of the H.P.W. Stores, Inc., with the defendant, which transfer left the Stores totally without assets, by reason whereof it is averred defendant is liable for the amount due upon the gold notes.

Under the Civil Practice act on a motion to strike (as under the former practice upon demurrer) the pleading is construed most strongly against the pleader. In an action at law the motion now (as the demurrer formerly) admits only facts well pleaded but not mere conclusions. Marcus v. S. S. Kresge Co., 283 Ill. App. 556, and an exhibit attached under the Civil Practice act (contrary

to the former practice at law) is now a part of the pleading and controls the allegations of the complaint, if any, which tend to contradict it.

Exhibit C attached to count 1 is as follows:

"SEARS, ROEBUCK AND CO.
Executive Offices
Chicago

R. E. Wood
President

Feb. 15, 1929

Mr. James O. Alexander,
Executive Vice President,
Central Trust Company of Illinois,
125 W. Monroe St.,
Chicago, Ill.

Dear Mr. Alexander:

the
Sears, Roebuck and Co. is considering/taking over of the
H.P.W. Stores if certain arrangements can be made.

The stores are practically bankrupt at the present time.

Your (sic) hold \$200,000 in five year gold notes, due July 1, 1931, with interest at 5 per cent. You also have \$25,000 worth of common stock of the company, which was given to you as bonus stock, which is, of course, valueless at the present time. If we take over the company---and our taking it over will insure its financial solidity---we desire the bank to agree to four things.

1. That the common stock be turned over to Sears, Roebuck & Co. at once without charge.

2. That the gold notes be extended to July 1, 1932. (We will probably take them up at maturity, but we want the stores, which we will operate as a separate organization, to pay off their own obligations).

3. That you waive the interest on the notes until January 1, 1930.

4. That the bank give up its option on 10,000 shares of treasury stock.

Mr. Plummer will take this letter to you and will discuss the matter with you.

Very truly yours,
R. E. Wood."

The plaintiff's contend that the reasonable construction of the foregoing letter of February 15th is that it amounted to a promise on the part of defendant to pay the Five Year Gold Notes if the H.P.W. Stores, Inc., did not pay them. In support of this contention a careful analysis of the letter (sentence by sentence) is presented, from which the inference is finally drawn that the clause, "our taking it over will insure its financial solidity" would be understood by the plaintiff owners to mean that their

notes were to be paid and a promise by defendant to guarantee the payment thereof. Plaintiff further says that even if this interpretation may not be considered as certain, it has at least enough elements of probability to make the meaning of the letter in this respect ambiguous, and this being so, extrinsic evidence would be admissible from which the true meaning might be disclosed to amount to such a promise to pay. It was, therefore, they say, error to strike the first count. Plaintiff's cite Walker v. Johnson, 116 Ill. App. 145; Austin v. First Trust and Savings Bank, 343 Ill. 406, with Marcus v. S. S. Kresge Co., 283 Ill. App. 556. Plaintiff's also cite and rely on paragraph 3 of section 36 of the Civil Practice Act, which provides in substance the pleadings shall be liberally construed with a view to substantial justice. Section 33 of the Illinois act is substantially section 275 of the New York Civil Practice Act, from which it seems to have been taken. (McCaskill, Illinois Civil Practice Act Annotated, (1933) p. 63.) The New York section was construed by the highest court of that state in Dyer v. Broadway Central Bank, 252 N. Y. 430, where it was held that upon a motion to dismiss a complaint upon the ground that it did not state a cause of action, every intendment and fair inference is in favor of the pleading, and that "if in any aspect upon the facts stated the plaintiff is entitled to a recovery, the motion should be denied." The defendant in that case made its motion upon the ground that the complaint stated a void and illegal transaction, namely, the purchase by a state bank of common stocks of corporations which, under the law of the state, was illegal and void. The judgment of the trial court sustaining the motion was reversed upon the theory that, while the bank could not legally purchase such stocks for its own account, it might legally purchase the same under certain circumstances, and the legality of such a purchase could not, therefore, be determined upon a motion to dismiss

the complaint. So here the plaintiff's argue there are facts and circumstances surrounding the writing of the letter which determine whether it should be in fact construed as a promise to pay, which cannot be determined upon a motion to strike, but only by taking evidence.

The argument is plausible but not convincing. It is true the pleadings are now required to be construed liberally, but it is also true under the present practice that where there is a contradiction between the allegations of the complaint and the exhibit attached and made a part of the pleading, the exhibit will control, and a motion to strike does not admit to be true an allegation of fact which is in conflict with the exhibit. Bunker Hill Country Club v. McElhatton, 282 Ill. App. 221; Lyons v. 333 N. Michigan Avenue Bldg. Corp., 277 Ill. App. 93; Marcus v. S. S. Kresge Co., 283 Ill. App. 556. Under the Civil Practice Act a motion of this kind does not admit the conclusions of the pleader to be true nor inferences drawn therefrom by him. Marcus v. S. S. Kresge Co., 283 Ill. App. 556; Leitzman v. Radio Broadcast Station, W.C.F.L. 282 Ill. App. 203; Keller v. Reed, 347 Ill. 645.

Applying the above rules to the first count of the complaint, we hold the motion to strike the first count was properly granted. Ingenious as the analysis of the plaintiff's is, it does not, as we read the exhibit, disclose any ambiguity as to any offer or promise, nor indeed show any offer or acceptance or promise at all. The document, on its face, clearly and without any ambiguity, is merely a suggestion for preliminary negotiations. It states that defendant is considering taking over the Stores "if certain arrangements can be made," and in concluding informs the person to whom it is addressed that Mr. Plummer "will take this letter to you and will discuss the matter." It is clear the only purpose of the letter was that it might form the basis of negotiations from which possibly it might be determined whether the parties could make a binding agreement.

In the First Volume, Revised Edition, 1936, Williston on Contracts, sec. 26, pages 52-53, it is said to be elementary that, "Since an offer must be a promise, a mere expression of intention or general willingness to do something on the happening of a particular event or in return for something to be received, does not amount to an offer." To the same effect is the Restatement of Contracts, sec. 25, "If from a promise or manifestation of intention, or from the circumstances existing at the time, the person to whom the promise or manifestation is addressed, knows or has reason to know that the person making it does not intend it as an expression of assent, he has not made an offer", and in the same volume, sec. 27, pp. 54-55, is this statement:

"Frequently negotiations for a contract are begun between parties by general expressions of willingness to enter into a bargain upon stated terms, and yet the natural construction of the words and conduct of the parties is rather that they are inviting offers or suggesting the terms of a possible future bargain before making positive offers."

In support of these statements the author cites innumerable cases from many jurisdictions. As a matter of fact, the complaint here shows that five days after this letter was written the subject matter of the negotiations was made the subject of a written agreement between the parties, in which, however, defendant did not agree to guarantee the payment of the notes held by plaintiff, and the conduct of the parties thereafter, as recited in the complaint, shows that they did not regard such an agreement as being imposed by anything said in the negotiations or contained in the contract. Such being the state of the matter, this count wholly fails to set forth a cause of action, and the motion to strike it was properly granted by the court.

The second count of the complaint (which is paragraphs 12 to 16) charged a similar liability of defendant to the plaintiff's upon the theory that the relationship between defendant corporations

and the H.P.W. Stores, Inc., became such as to create the same liability on defendant's part to guarantee the payment of the notes held by the plaintiffs. The count, in its several paragraphs, alleges that after the contract of February 20th was entered into, defendant became the owner of a majority of the outstanding stock of the H.P.W. Stores, Inc.; that thereby it obtained complete control of the policies, affairs, offices and employees thereof; that defendant resorted to this stock ownership not for the purpose of participating in the affairs of the corporation in the normal and usual manner, but for the purpose of controlling the corporation and dominating its management and affairs so that it was used as a mere agency, tool or instrumentality of Sears, Roebuck and Co., and the defendant, Sears, Roebuck and Co., although retaining the same, took over the corporation and operated it as a department and adjunct of the defendant. Upon information and belief, paragraph 13 of the second count charges that at no time subsequent to the acquisition of control were any regular stockholders' meetings called for the election of directors, nor regular annual directors' meetings for the election of officers held; that the directors, officers and employees were at all times determined and directed by the management of defendant, and that all persons acting in executive capacities were officers, employees or representatives of defendant or employees of defendant's counsel. Paragraph 14 alleges that the departmental relationship of the two corporations was generally known to creditors, who, in reliance on this manner of operating, regarded themselves as creditors of defendant and were so regarded by defendant, who paid off liabilities incurred in the name of the H.P.W. Stores, Inc., and plaintiffs aver that they have so regarded themselves with respect to the Five Year Gold Notes, and were so led to regard themselves by

reason of the absorption of the Stores into the defendant organization.

Paragraph 15 avers that the departmental relationship of these two corporations was not disclosed to the general public, was not widely known among retail buyers; that by reason thereof these two corporations were enabled to and did use the H.P.W. Stores, Inc., as outlets for merchandise which had been purchased for sale in the stores of defendant, but which became or was discovered to be obsolete, defective, or inferior and not saleable through defendant's stores without great loss of money or good will; that by retailing such merchandise through the H.P.W. Stores, Inc., defendant was enabled to maintain its own good will attached to its name while destroying the good will attached to the name of the H.P.W. Stores, Inc.; that this device made the operation appear unprofitable while in reality it cut down losses which otherwise would have fallen on defendant. Paragraph 16 avers that the type of merchandise known as "close-outs" were charged to the H.P.W. Stores, Inc., on the books of defendant at prices grossly excessive; and that by this means defendant created on its books an indebtedness of the H.P.W. Stores, Inc., to defendant to the amount of \$1,076,148; that on or about March 5, 1934, defendant caused all of these assets of the Stores to be delivered to it in exchange for a credit of \$253,424, the alleged indebtedness of the H.P.W. Stores, Inc., to defendant. Wherefore, it is averred defendant is liable to pay the bonds of the plaintiffs.

It must be kept in mind that this action is at law not in equity. The question for determination as to the second count is whether the facts averred (construed according to rules heretofore stated) are sufficient to establish the liability of defendant at law to pay the debt due plaintiffs on account of the bonds held by

them. That a controlling corporation may under some circumstances become so liable has been held in many cases, and the leading cases establishing liability, as well as those establishing non-liability, are cited in the briefs. It would unduly extend this opinion to analyze all of them. Defendant cites In re Watertown Paper Co., 169 Fed. 252; United States v. Delaware, Lackawanna & Western R.R. Co., 238 U. S. 516; Chicago, Milwaukee & St. Paul Railway Company v. Minneapolis Civic & Commerce Ass'n., 247 U. S. 490; Kingston Dry Dock Co. v. Lake Champlain Transportation Co., 31 Fed. (2d) 265; In re Kentucky Wagon Mfg. Co., 3 Fed. Supp. 958. The Illinois cases of McDermott v. A. B. C. Oil Burner Sales Corporation et al., 266 Ill. App. 115; Donovan v. Purtell, 216 Ill. 629; Seymour v. Woodstock and Sycamore Traction Co., 281 Ill. 84, and Loewenthal Securities Co. v. The White Paving Co., et al., 351 Ill. 285.

No one of these cases is decisive of this one. Illinois, as other jurisdictions, holds the elementary and fundamental principle that a corporation is an entity separate and distinct from its stockholders. McDermott v. A. B. C. Oil Burner Sales Corporation et al., 266 Ill. App. 115. In Kingston Dry Dock Co. v. Lake Champlain Transportation Co., 31 Fed. (2d) 265, the court stated the rule thus:

"* * * * * Control through the ownership of shares does not fuse the corporation, even when the directors are common to each. One corporation may, however, become an actor in a given transaction, or in part of a business, or in a whole business, and, when it has, will be legally responsible. To become so it must take immediate direction of the transaction through its officers by whom alone it can act at all."

In New York Trust Co. v. Carpenter, 250 Fed. 668, the opinion of the court says:

"From an examination of many decisions we venture to say that no corporation acting within its powers has been held liable for the debts of another corporation legally organized, because it controlled such corporation by reason of ownership of its stock, or otherwise, except by reason of contract or on grounds of agency, or

of estoppel, or because the controlled corporation has been used in such a way that the maintenance of its character as a separate and distinct entity would work injustice."

In Berkey v. Third Ave. Ry. Co., 244 N. Y. 84; 50 A.L.R. 599, where a question of liability of the parent corporation for the tort of a subsidiary corporation was involved, the opinion stated in substance that the test was whether the obligation was incurred while the dominion of the parent corporation was so complete that by the general rules of agency the parent corporation was a principal and the subsidiary an agent, and added:

"Where control is less than this we are remitted to the tests of honesty and justice. Ballantine, Parent and Subsidiary Corporation, 14 Cal. Law Rev. 12, 18-20."

The rule stated in Erkenbrecher v. Grant, 187 Cal. 7, followed in First National Bank v. Walton, 146 Wash. 367, is:

"In order to cast aside the legal fiction of distinct corporate existence as distinguished from those who own its capital stock, it is not enough that it is so organized and controlled and its affairs so managed as to make it 'merely an instrumentality, conduit or adjunct' of its stockholders but it must further appear that they are the 'business conduits and alter ego of one another' and that to recognize their separate entities would aid the consummation of a wrong."

As defendant points out, the cases cited in which defendants have been held liable are distinguishable from the instant case, first, in that here the debt upon these bonds was contracted prior to the time when defendant took control of the subsidiary corporation, and prior to the time that the contract of February 20, 1929, between the plaintiffs and defendant was executed. We have already seen that these contracts, fairly construed, cannot be held to contain an agreement on the part of defendant to assume the debt.

Second, that defendant in this case was already a preferred creditor, who, under the agreement as well as by rules of ~~the~~ law, was entitled to protect its investment in the M.P.W. Stores, Inc., by actively participating in its affairs without becoming liable

for pre-existing debts. Owl Fumigating Corporation v. California Cyanide Co., 24 Fed. (2d) 718, affirmed 30 Fed. (2d) 812.

Third, there is not in this or any count of the declaration any adequate allegation charging that defendant has acted in fraud of the rights of plaintiff's as creditors of the Stores corporation. It is nowhere charged in the complaint that at the time defendant assumed control the value of the assets of the debtor were in excess of the amounts due and owing to preferred creditors.

Fourth, we think the complaint also shows that plaintiff's acquiesced in, agreed to or ratified the acts of defendant with reference to the taking over of the H.P.W. Stores, Inc. This appears from the contract between defendant and plaintiff's entered into December 31, 1929. This contract recites the wish of plaintiff's that defendant would refrain from collecting moneys which it had theretofore advanced under the prior contract of February 15, 1929, and requested defendant to continue furnishing additional merchandise and to give further financial aid.

There is no averment in the complaint of a merger between the subsidiary and the defendant corporation. In Fletcher Cyclopedia on Corporations, vol. 13, section 6222, page 566, the author states:

"However, the stockholding or parent corporation often is held liable for the debts or acts of a subsidiary because of the existence of facts other than the mere relationship of the former as a stockholder, on the theory of a disregard of the corporate entity of the two corporations, but no fixed rule can be laid down as to when such liability exists. According to one writer the test is the manner and method of organization and operation. Another author, in a valuable textbook devoted to the subject of parent and subsidiary corporations, states that the three elements involved are (1) control of the subsidiary corporation, (2) fraud or wrong of the parent corporation with respect to the creditor of the subsidiary or the person injured by such subsidiary, and (3) unjust loss or injury to the creditor or person injured; and he sums up the basis for abrogating the normal immunity of stockholders in such cases as an abuse of the privilege to do business in a corporate form, or in other words, a fraud upon the law."

As defendant points out, the cases cited by plaintiff may be grouped into three classes: First, those where the subsidiary corporation was held to have incurred the obligation while acting as an agency or instrumentality of the parent corporation. We have already seen that the instant case is distinguishable from the cases in which liability is predicated upon that ground. Second, cases where there has been a fraudulent conveyance of assets from the subsidiary to the parent corporation. In this case there is no allegation in the complaint of such fraudulent conduct. Third, cases where the subsidiary corporation has been used for the purpose of perpetrating a fraud or to evade salutary legislation. Of this, also, there is no allegation in the complaint.

There is nothing in the facts, as alleged in the second count, that would justify us in holding defendant liable. We, therefore, hold the second count did not state a cause of action. It follows that the judgment of the trial court must be affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

37725

SAM BLUM,

Appellant,

vs.

PROVIDENT MUTUAL LIFE INSURANCE
COMPANY OF PHILADELPHIA, a
Corporation,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

288 I.A. 615²

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, Sam Blum, filed his complaint in chancery in the Circuit court of Cook county seeking the same relief which he sought in his cross-complaint filed in the case now in this court as No. 39155. In the instant case a demurrer to the complaint was sustained and it was ordered that the complaint be dismissed; the plaintiff appealed to this court from that order; subsequently there was filed in this court a stipulation that the filing of abstracts and briefs be waived and that the decision in this cause should abide by our decision in case number 39155.

We have this day filed in that case an opinion affirming the order of the trial court sustaining a motion to strike the cross-complaint of Sam Blum and ordering that it be dismissed. Pursuant to the terms of the stipulation, the order of dismissal in the instant case is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

39085

KELLIE SCULLY,

Appellee,

vs.

GUY A. RICHARDSON and WALTER J.
CUMMINGS, as Receivers, etc.,
et al., doing business as
CHICAGO SURFACE LINES,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

288 I.A. 615³

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff was injured while riding in an automobile owned by her and driven by her minor son, through a collision with one of defendants' street cars; she brought suit for damages and upon trial had a verdict for \$5000; defendants appeal from the judgment on the verdict.

The accident happened about 7:30 p. m. on June 11, 1933, at the intersection of Western boulevard and 35th street in Chicago; it was quite light; plaintiff's automobile was south-bound on Western boulevard and defendants' street car was west-bound on 35th street; the collision occurred in the street intersection.

The burden of defendants' brief is that the failure of plaintiff or the driver of her automobile to exercise due care contributed to the accident, and a large number of cases are cited which involve accidents more or less like the instant one, in which it is held that one who is guilty of negligence contributing to an accident cannot recover damages. As it has been repeatedly said in cases of this kind, the facts in no two cases are precisely alike, and the question of contributory negligence is usually one of fact to be determined by a jury.

A number of witnesses testified on behalf of the plaintiff as to the occurrence; no evidence was introduced by defendants. The jury could properly believe that as plaintiff's automobile

approached 35th street, going south on Western boulevard, she was in the rear seat, her son William, 17 years of age, was driving and the stop and go lights were red against Western boulevard traffic; plaintiff's automobile stopped at the crosswalk as did another southbound automobile to the west of plaintiff's automobile; there were also two automobiles northbound on Western boulevard approaching 35th street, and all four automobiles stopped for the red light; at this time William looked to the east and saw defendants' street car coming westward on 35th street about three hundred feet from Western boulevard, going at the regular rate of speed for a street car - about twenty miles an hour. When the street car was about twenty feet east of the east crosswalk of Western boulevard the traffic lights changed, setting the red light against westbound traffic and the green light in favor of Western boulevard traffic; all four automobiles started forward across 35th street, but the street car did not stop but ran through the red light and across Western boulevard; one witness testified that apparently when the red light went on against the street car the motorman accelerated the speed of the car and started across the intersection. The northbound automobiles, after going a few feet, stopped in time to avoid a collision with the street car; the two southbound automobiles also started at the same time with the green light, and the southbound automobile farthest to the west crossed safely in front of the street car, but plaintiff's automobile was struck on the left hand side.

It is a fact of considerable importance that the drivers of all four automobiles at this point assumed that the street car would stop at the red light. The situation made this assumption reasonable, and plaintiff's driver would be influenced by this to go along with the automobile traffic although he did not notice

that the street car had entered the intersection until it was about two or three feet away from his automobile.

There is no syllogism or mathematical formula by which to determine negligence. The conclusion usually depends on how a particular set of facts impresses one of ordinary intelligence. In the instant case, whether the plaintiff's driver was in the exercise of due care must be determined by the reaction of the jurors who heard the recitals of the witnesses as to the details of the accident. It may be conceded that plaintiff herself, who was reading a magazine at the time of the accident, was relying upon her son who was driving her automobile, and his negligence, if any, must be imputed to her. One might conclude after the occurrence that plaintiff's driver should not have started across 35th street until the street car had crossed Western boulevard, but this is not the test. The question is, Was the conduct of the driver, in face of the situation presented, negligence contributing to the accident? Considering all the circumstances it cannot be held as a matter of law that plaintiff's driver should not have attempted to cross 35th street as he did, and neither can it be said that the conclusion of the jury that in so doing he was not guilty of negligence, is clearly against the weight of the evidence. "Where reasonable men acting within the limits prescribed by law might reach different conclusions, or different inferences could reasonably be drawn from the admitted or established facts, the question of contributory negligence is for the jury." Bueller v. Phelps, 252 Ill. 630.

Complaint is made of instructions given at the request of the plaintiff. These instructions are the kind usually given in cases of this character. They have been frequently approved by the courts and we find no reversible error in giving them.

Defendants say that the amount awarded plaintiff is excessive. She suffered fracture of the left clavicle and injury to the pelvis, with numerous lacerations; there was evidence of considerable pain and shock resulting from the injury and loss of blood; an X-ray film showed a fracture of the body of the ascending ramus of the right pubis; plaintiff was immobilized for about twelve weeks, kept for three weeks in a hospital, and thereafter in her room for six or more weeks. We cannot say that the amount of the verdict is excessive.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

39122

L. E. SEITZ,
Appellant,

vs.

EDWARD P. ALLISON COMPANY, INC.,
a Corporation,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

288 I.A. 616¹

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his complaint alleging that while he was employed by defendant it made certain promises of compensation to him which it did not keep, and he sought an accounting; answer was filed and reference made to a master in chancery who after hearing evidence reported adversely to plaintiff's claim, recommending that the complaint be dismissed; exceptions were overruled by the chancellor and a decree entered dismissing the complaint, from which plaintiff appeals.

The agreements for plaintiff's compensation were made orally between him and Edward P. Allison, president of defendant company; they differ as to the terms of the agreements, and the decisive question is, which of the two versions shall be accepted.

Defendant is a corporation engaged in the electrical contracting business, organized under the laws of Missouri and licensed to do business in Illinois; defendant opened an office in Chicago and plaintiff was employed as manager of the Chicago office.

In June, 1925, the United States Internal Revenue Department notified defendant that it owed additional income taxes, amounting to approximately \$30,000; defendant contested this.

From 1925 to 1928 defendant was a sub-contractor for electrical work for the First National Bank Building in Chicago. Plaintiff testified that Allison agreed to give him, in addition to his

salary of \$100 a week, 10% of the profits of the bank building job in the nature of a bonus, to be paid when this income tax case should be settled. Allison denies he agreed unconditionally to pay plaintiff 10% of the profits on the bank building job, and says that he agreed to pay him this bonus only in the event defendant was successful in the tax case.

The tax case was finally ended in July, 1933, and defendant was unsuccessful and was compelled to pay over \$28,000 to the government and attorney's fees of \$4000. Therefore, says defendant, the condition of the promise to pay a bonus having failed, it is not obligated to plaintiff for any bonus or commission.

Was the oral agreement to pay plaintiff a bonus unconditional, as plaintiff says, or upon the contingency testified to by Allison? Plaintiff's testimony with reference to this tax matter is not convincing. He says he first heard of it in 1921, and that it was a matter of common knowledge. Allison testified that the first he knew of it was in 1925, and his version is supported by a letter from the Revenue Department dated June 12, 1925.

Plaintiff testified that when the bank job started in 1925 he and Allison went over the details of the job and it was then agreed that plaintiff was to get 10% of the profits, and yet he later testified that the first time he had a definite agreement for a commission on this job was in 1929.

In 1925 plaintiff had a disagreement with Allison which resulted in an order ending plaintiff's authority to sign checks for the defendant. The relationship became strained and finally plaintiff left defendant's employ in August, 1928. He testified that at this time Allison said to him that anyone who left defendant "can never come back," and yet, in the face of this plaintiff then made no claim for commission on the bank job.

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In August, 1929, plaintiff returned to defendant; there is much testimony as to how this resumption of employment came about; plaintiff's wife gave testimony tending to show that it was through a call she made upon Mr. Allison with reference to her husband's returning to the defendant's employ, and there is variant testimony as to what was said at this time.

Plaintiff testified that when he returned to defendant he had a definite agreement with Allison that he should receive 10% of the profits on the bank job, while Allison's testimony is definite and positive that the agreement to pay a commission on this job depended upon receiving a favorable decision in the tax case; and Allison testified that it was agreed that plaintiff should receive a salary of \$100 a week and 10% of any profits on work thereafter procured by him, but this agreement could be terminated at any time by either party.

In 1929 defendant gave plaintiff a statement showing such profits, and 10% or \$455 was paid to him. Again, in 1930, defendant gave plaintiff a statement showing profits and a commission due him of a little over \$3000, which was paid to him. He made no objection to these statements and payments. At the close of 1930 Allison told plaintiff that beginning with 1931 there would be no more commissions paid until the income tax case was settled favorably to defendant. Friction again occurred between plaintiff and Allison and continued until 1931, when Allison took over the management of the Chicago office.

In January, 1930, plaintiff met with an accident, breaking an ankle; he remained in a hospital for some time and during his illness defendant advanced certain sums of money. These advances were \$464.76 in excess of the amount due him on commissions, and in September, 1931, the secretary of defendant company wrote to plaintiff

from St. Louis, calling his attention to this overpayment and inquiring how it should be handled. In December another communication was sent to plaintiff inquiring how this item should be adjusted. In answer to this plaintiff wrote that he was under the impression this excess was with the approval of Mr. Allison, and "his word is final and whatever he so directs settles it." His letter made no reference to any moneys claimed to be due him, although it was written a few days before the end of 1931. Nor was anything then said about any money due plaintiff on the bank job. Plaintiff's testimony attempting to explain this letter is confusing and contradictory in many respects.

In May, 1932, Allison reduced plaintiff's salary to \$75 a week, with the understanding that if during that year the business of defendant earned sufficient profits he would receive the difference between this and \$100 a week. It is stipulated that the profits of defendant for the year 1932 were only \$309.30. At the end of 1933 Allison informed plaintiff that it was necessary to reduce his salary to \$50 a week for the year 1934, and that if the business earned sufficient profits during that year he would receive the difference between \$50 a week and \$75 a week. For the year 1934 the books showed a loss of \$3306.10.

When plaintiff was told that it would be necessary to reduce his salary to \$50 a week for 1934 he agreed to the arrangement and continued to work for defendant, making no claim for additional compensation even when he received his last salary check of \$50 on February 7, 1935, which was the final week of his employment; he then left defendant for employment with the United States government.

We have given a condensed review of the salient points in the evidence. The record contains a mass of testimony, mostly relating to conversations, which is of no critical importance. The

simple question presented is whether plaintiff's version of the oral agreements with reference to the commissions and salary, or the testimony of Allison, should be accepted. The master, who saw the witnesses and heard them testify, accepted Allison's version of the agreement and his finding was approved by the chancellor. There is abundant intrinsic evidence supporting this conclusion. The report of a master in chancery is entitled to appropriate consideration. Allison's testimony is not improbable or unlikely in any part, while that of Seitz is inconsistent and in some respects so improbable as to make it unreliable.

We see no reason to disagree with the conclusion of the master in chancery, and the decree dismissing the complaint in accordance with his recommendation is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

39155

MINNIE D. CHEVLEN, Administratrix
of the Estate of SAMUEL S. CHEVLEN,
Deceased,

Plaintiff,

vs.

MORRIS MORRISON, HARRY MORRISON and
BESSIE MORRISON, co-partners, doing
business as MORRISON FINANCE COMPANY,
SAMUEL BLUM, PROVIDENT MUTUAL LIFE
INSURANCE COMPANY OF PHILADELPHIA,
a Corporation, LOUIS MORRISON and
MORRIS W. FINKELSTEIN,
Defendants.

SAM BLUM, (Cross Plaintiff)
Appellant,

vs.

PROVIDENT MUTUAL LIFE INSURANCE
COMPANY OF PHILADELPHIA, a
Corporation, (Cross Defendant)
Appellee.

288 I.A. 616²
APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Minnie D. Cheven, administratrix of the estate of Samuel S. Cheven, deceased, filed her bill of complaint against members of a co-partnership doing business as Morrison Finance Company, and certain other defendants, including Sam Blum and Provident Mutual Life Insurance Company of Philadelphia; she sought an accounting and the proceeds of a life insurance policy issued by the Insurance company on the life of her husband, Samuel S. Cheven; defendants filed answers, and Sam Blum, hereafter called cross-plaintiff, filed his cross-complaint against the Provident Mutual Life Insurance Company as cross-defendant, seeking a money decree of \$10,000 against the company, with interest, claiming an assignment to him of the proceeds of the policy after the death of Samuel S. Cheven, the insured; the cross-defendant moved to strike this cross-complaint, which motion was sustained, and cross-

plaintiff not amending his cross-complaint it was dismissed and he appeals.

It is conceded that the controversy on this appeal is confined to the action of the trial court in sustaining the Insurance company's motion to strike the cross-complaint of Blum. No questions are presented touching the issues raised by the original complaint of Minnie D. Cheylen, the administratrix, or the answers of the defendants.

The cross-complaint alleged the issuance by the Insurance company of a \$10,000 insurance policy on the life of Samuel S. Cheylen, dated October 22, 1928, with Samuel S. Cheylen & Company, Inc. named as beneficiary; that the insured and the beneficiary were indebted in excess of \$20,000 and November 14, 1930, executed an assignment of the policy to Morrison Finance Company; this assignment was filed with the Insurance company in accordance with the provisions of its policy.

That subsequently a corporation known as the Cheylen Potato Company was organized, which was to be substituted for Samuel S. Cheylen & Company, Inc., as beneficiary of the policy; that thereafter, at the request of the insured and Cheylen & Company, Inc. and Morrison Finance Company, the Insurance company agreed that if the assignment of the policy to the Morrison Finance Company were released and a proper request made to change the beneficiary to Cheylen Potato Company, a corporation, the change would be made in the policy; that a release of the assignment to the Morrison Finance Company was thereafter made and a proper request for a change of the beneficiary to the Cheylen Potato Company, a corporation, was prepared and both of these documents were delivered to the Insurance company; that the Insurance company did not indorse on the policy the name of the new beneficiary and did not return to the Morrison Finance Company its release.

The policy, which is attached to the cross-complaint, provides for the payment of premiums on the 22nd day of April and of October of each year. The cross-complaint further alleged that the premium which fell due on April 22, 1931, was not paid because of the refusal of the Insurance company to change the beneficiary to the Cheylen Potato Company, a corporation; that this refusal constituted a breach of the contract of insurance and therefore no premiums became thereafter due and payable.

That the insured died July 8, 1933, and due proofs of death were filed; that on September 11, 1933, the Morrison Finance Company for a valuable consideration assigned in writing its claim as assignee of the policy to the cross-plaintiff, Sam Blum.

The cross-complaint further averred that the policy was issued in the state of Pennsylvania and that its laws provide a method which such insurance companies must follow in computing its reserve on each policy, its cash value, loan value, values for extended insurance, and other values; that at all times after April 22, 1931, when a semi-annual premium fell due, the Insurance company had on hand and available, sufficient money belonging to the insured, which had accumulated under the policy as cash value and declared dividends, to pay the regular premiums on the policy as they became due, which money if properly applied to the payment of these premiums would have paid them all up to and beyond the time of the death of the insured.

Cross-complaint prayed an accounting and discovery by the Insurance company, propounding a number of interrogatories, and asked for the cancellation of the release by the Morrison Finance Company of its interest in the policy and for a money decree of \$10,000 against the Insurance company, with interest from the date of the death of the insured.

Cross-plaintiff in this court says that the insured was excused from paying premiums falling due on or after April 22, 1931, by reason of the breach of the policy contract by the Insurance company in failing to change the beneficiary as requested. A number of answers are made to this. The provision of the policy governing changes of beneficiary require the request for change to be filed at the home office of the Insurance company "accompanied by this Policy," and that the company shall be charged with notice of the change only when indorsed on the policy. The cross-complaint does not allege that the policy was returned to the Insurance company for this indorsement. In Begley v. Miller, 137 Ill. App. 278, under a similar state of facts, it was held that if the insured desired to change the beneficiary he must forward the policy for indorsement, as required by its terms.

Moreover, as we have held in Sun Life Assur. Co. v. Williams, 284 Ill. App. 222, (leave to appeal denied by the Supreme court) the provision for the indorsement on the policy is for the protection of the company and the change becomes effective when properly requested. See also Crawford v. Wyant, 284 Ill. App. 336. The cases cited by cross-plaintiff, Freund v. Freund, 218 Ill. 189, and McElldowney v. Metropolitan Ins. Co., 347 Ill. 66, followed an interpretation of a New York statute governing changes of beneficiary; but similar provisions for change of beneficiary appearing in policies of insurance have latterly been construed otherwise. White v. White, 194 N. Y. S. 114, and cases there cited, Chatham Phenix N. Bank & T. Co. v. Travelers' Ins. Co., 251 N. Y. S. 43, Baley v. Prudential Ins. Co. of America, 263 N.Y.S. 244, and Levy v. New York Life Ins. Co., 265 N.Y.S. 377.

The instant policy was issued in Pennsylvania, and under the law of that state when the insured has complied as fully as lies within his power with the requirements for the change of

beneficiary, such change is effective although not indorsed upon the policy. Ruggeri v. Griffiths, 315 Pa. 455; Skamoricus v. Konagiskie, 318 Pa. 128; Riley v. Wirth, 313 Pa. 362. Cross-plaintiff alleges that everyt ing required by the policy to effect the change of beneficiary to Chevlen Potato Company had been done; if this is so, then such change was completed and effective even though the Insurance company refused to indorse the change on the policy.

Counsel for the Insurance company aptly note that either the predecessors in interest of cross-plaintiff did not comply with the terms of the policy relating to a change in beneficiary, in which case they were not entitled to a change, or, if they did fully comply, the change was completed without any indorsement on the policy, and that in either event there was no breach of the contract by the Insurance company.

The cross-complaint alleges that when the release of the Morrison Finance Company, with a request for change of beneficiary, was sent to the Insurance company, it "wrongfully and fraudulently or by mistake filed and retained said release." It is not alleged that it was ever asked to cancel or return the release, and it has been frequently held that the term "wrongfully and fraudulently" and similar expressions are merely surplusage in the absence of allegations of facts showing what the supposed fraud or other offenses charged were. Stephens v. Collison, 249 Ill. 225; Doose v. Doose, 300 Ill. 134; Ater v. McClure, 329 Ill. 519; Heavner v. Heavner, 342 Ill. 321. We do not see how cross-plaintiff can base any cause of action upon the mere failure of the Insurance company to return or cancel the release when it is not alleged that it was ever requested to do so, or that it would refuse to do so if requested.

Cross-plaintiff's theory is that the non-action of the

Insurance company amounted to an anticipatory breach of the contract of insurance which entitled him, as assignee, to the face amount of the policy as damages. Mobley v. N. Y. Life Ins. Co., 295 U. S. 632, holds that an anticipatory breach means such repudiation by one party as entitles the other to treat the contract as absolutely and finally broken. In that case the insurance company refused to pay monthly disability benefits through the mistaken belief that the degree of disability conditioning the right to such payments no longer existed. Plaintiff brought suit for the face value of the policy, alleging an anticipatory breach. It was there held that the action of the Insurance company did not amount to a repudiation of the policy. In New York Life Ins. Co. v. Viglas, 56 S. Ct. Rep. 815, under a similar state of facts it was held that there was no anticipatory breach of the contract of insurance. Able counsel for cross-plaintiff have cited a large number of cases tending to support the proposition that a breach by an insurance company gives the right of an immediate action to the person entitled to the proceeds of the policy. It would unduly lengthen this opinion to note them in detail. It is sufficient to say that in those cases the respective defendants had repudiated the contract; there is no repudiation of the policy contract in the instant case; the company is ready to abide by its contract.

The foundation stone of cross-plaintiff's claim is the allegation that the Insurance company had in its hands money belonging to the insured sufficient to pay each premium as it fell due until the insured's death. This is merely a conclusion, and an examination of the specific allegations of the cross-complaint completely negatives this.

Cross-plaintiff says that the loan value of the policy plus dividends was sufficient to pay the necessary premiums. The

policy provides that loans would be made on the security of the policy "on receipt thereof and of a satisfactory Advance Agreement." It is not alleged that the insured ever requested any loan or that the policy was offered as security or that any advance agreement was executed by the insured.

The provision of the policy touching non-payment of premiums reads -

"If any premium shall not be paid when due or before the expiration of the grace period of thirty-one days thereafter, this Policy shall cease and become void except as hereinafter provided by the non-forfeiture provisions."

The non-forfeiture provisions gave the insured three optional methods of utilizing the cash value or equity of the policy in the event of its lapse, namely, paid-up insurance, extended term insurance, or withdrawal in cash, and in case no other option was selected the policy became automatically valid for paid-up insurance. It follows, therefore, that the Insurance company could not, under the circumstances, use the cash value to make loans.

An even more convincing argument appears when the loan value of the policy is estimated as prescribed by the policy. The amount of the loan available to the insured is specified in the policy to be -

"a sum which, with all indebtedness on this Policy, and interest on said indebtedness and said sum to the end of the current policy year, and any unpaid portion of the premium for such policy year, shall not exceed the cash value of this Policy at the end of such policy year."

On October 22, 1931, the policy would be entering its fourth policy year, at the end of which its cash value would be \$680. To arrive at its available loan value according to the provisions just quoted, there must be a deduction of \$528.99 from this cash value, which leaves an available loan value of \$151.01, which is not sufficient to pay the premiums to October 22, 1932.

Counsel for cross-plaintiff apparently do not stress the claim that the insured was entitled to extended term insurance.

In any event, under the terms of the policy he was not entitled to this. The policy provides that the insured, wishing any extended term insurance, must within thirty-one days after the expiration of the grace period allowed for the payment of any premium in default, make written request for extended term insurance. It is not alleged that any such request was made. As we have said, the policy provided that unless the insured elected extended term insurance or withdrawal of the cash value of the policy, it should automatically become valid as paid-up insurance for the life time of the insured, and the insurance company is obligated to apply the automatic option. Dwyer v. Metropolitan Life Ins. Co., 132 S. C. 10.

Even had the insured exercised the option for extended term insurance, this would not have covered him at the date of his death. As shown in the policy, the term of extended insurance on April 22, 1931, was one year and 329 days, and the insured lived 106 days after the expiration of that period.

Cross-plaintiff says that a dividend of \$43.60 should be applied to the purchase of extended insurance, but it is not alleged that this would have purchased insurance covering the date of the insured's death. Moreover, as this dividend was less than any semi-annual premium under the policy, the company was not obliged to accept it as partial payment of premium but was obligated to hold it to the credit of the policy, or payable in cash on demand. Slocum v. New York Life Ins. Co., 223 U. S. 364; Williams v. Union Central Life Ins. Co., 291 U. S. 170.

Counsel for cross-plaintiff in his reply brief disclaims any desire or intention to ask for any general accounting of excess reserves and undeclared dividends, and relies upon the cash value set forth in the policy table of nonforfeiture values and the dividends actually declared. It thus becomes unnecessary to discuss

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whether cross-plaintiff has any right to any accounting of the Insurance company's alleged excess reserves and undeclared dividends.

There are a number of cases holding that declared dividends due the insured should be applied to prevent default in the payment of premiums. There are also other cases holding that the dividends should be added to the policy reserve to increase the duration of the extended term insurance then available. It is unnecessary to cite or distinguish these cases, for in the present case - as apparently cross-plaintiff admits - the application of the declared dividends would not have carried the extended insurance to the date of the insured's death.

To have followed in detail all the points made by respective counsel would have made this opinion even longer than it is. As we are of the opinion that the cross-complaint of Blum did not set forth sufficient facts to entitle him to the relief sought, the motion to strike was properly sustained and the order of dismissal is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

38875

PEOPLE OF THE STATE OF ILLINOIS
ex rel. CHARLES H. BORDEN and
IRVING J. SOLOMON,

Appellees,

vs.

VILLAGE OF FOREST PARK et al.,
Appellants.

APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

288 I.A. 616³

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Charles H. Borden and Irving J. Solomon filed a petition against the Village of Forest Park and some of its officials, praying that a writ of mandamus issue to compel the payment of \$25,000 for attorneys' fees for services rendered by them to the Village. Defendants answered, contending that the writ should not issue. There was a hearing before the court without a jury, a judgment awarding the writ, and defendants appeal.

The record discloses that the Village of Forest Park was operating under the commission form of government, and had on deposit in a bank located in the Village approximately \$104,000. The bank failed and was in process of liquidation and the Village sought to recover the amount of its deposit as a preferred claim. To bring about this result, the Village council on January 6, 1932, passed a resolution authorizing the mayor of the Village to employ the law firm of Eisendrath, Solomon and Borden, of Chicago, to represent the Village and to pay the attorneys a "fair and reasonable compensation" for the services they might render. A contract was entered into accordingly, and the attorneys immediately began their services, the work being done by Borden and Solomon, Mr. Eisendrath retiring from the firm shortly after the passage of the resolution. The services extended over a period from about January, 1932, to April, 1935. Among other things there was a hearing before a Master in Chancery, who found that the money on deposit at

that time, \$104,037.54, was a trust fund and recommended that a decree be entered awarding the Village this amount as a trust fund. Objections were filed to the Master's report, and on being overruled were ordered to stand as exceptions. They were argued before Judge Burke before whom the cause was pending, who apparently took the matter under advisement and while the matter was thus pending plaintiffs, apparently in accordance with the prior understanding between them and the then Village attorney, on July 23, 1934, submitted their bill of \$25,000 for services. The bill was brought before the Mayor and the Commissioners by the Village attorney on July 23, 1934, rather briefly considered, and immediately thereafter, on the same day, the annual appropriation ordinance was passed for the years 1934 and 1935. It contains a great many separate items, including "Law Department \$25,000." The bill for services above mentioned is typewritten on plaintiffs' letterhead and consists of but one page. There is a statement of a general character as to the services performed by the attorneys, and at the bottom of the page immediately following the bill appears the following in typewriting: "The amount of this bill has been fixed on the theory that the decree presented to Judge Burke will be entered substantially in the same form as presented." The decree mentioned in the note at the foot of plaintiffs' bill above quoted, which had theretofore been presented to Judge Burke, was never entered. The case was transferred for hearing to Judge Klarkowski and was re-argued before him. He held that the Village was not entitled to a preference except to the extent of \$20,000, to which amount exceptions had been withdrawn, and a decree was entered accordingly. Plaintiffs took steps to perfect an appeal to this court, but in the meantime a new council of the defendant Village had been elected and they directed plaintiffs to dismiss the appeal, which was accordingly done in April, 1935. December 9, 1935, the Village council passed a resolu-

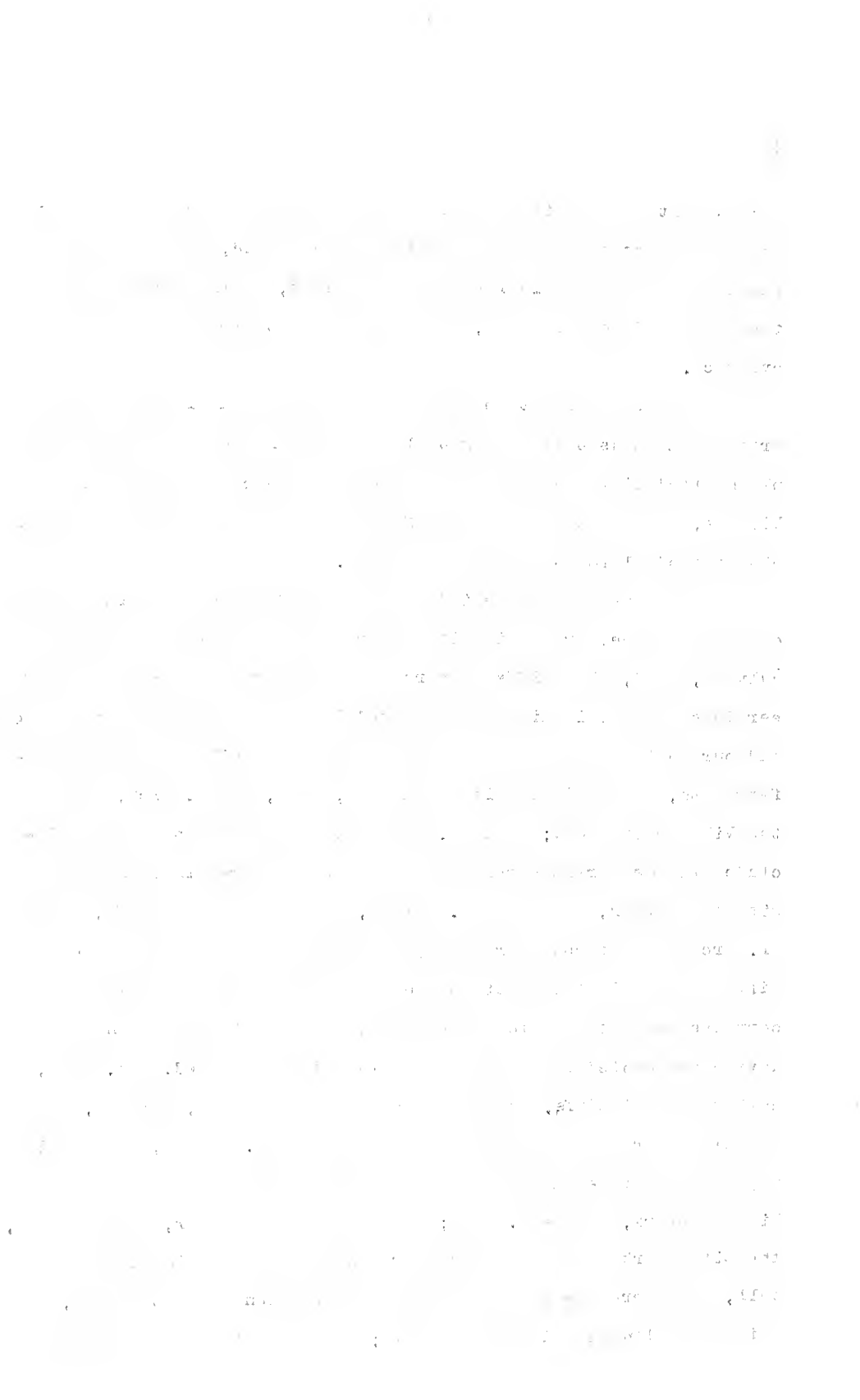
tion reciting that there were outstanding and unpaid miscellaneous claims aggregating \$136,000, one item of which was \$33,784.90 for payrolls of the police, fire and other departments of the Village, and that all such items had accrued prior to April 30, 1935. The resolution provided that bonds be issued in accordance with the Act of July 12, 1935, chap. 24, par. 997, secs. 1 to 6, Ill. State Bar Stats., 1935; Smith-Hurd, ch. 24, sec. 6621. Plaintiffs' claim of \$25,000 was not included in the resolution, and December 16, 1935, they filed their petition in the instant case, praying that a writ of mandamus be directed to the defendant Village and its officials commanding that they do "every act and thing devolved upon them by law for the payment" of the claim; that in case bonds mentioned in the resolution of the City council, above mentioned, were issued, that plaintiffs' bill for \$25,000 be included. The court heard the case, and March 4, 1936, entered judgment awarding a peremptory writ of mandamus commanding defendants "that they forthwith do every act and thing devolved upon them *** by law for the payment of the claim" of plaintiffs for \$25,000; that the claim be paid out of any funds now or hereafter available for the creditors of the Village and that such funds be applied to the payment of Village creditors - a pro rata share of such funds "to the payment of said claim; that they pay no other present creditor a greater proportion of his *** claim than they pay on account of *** claim of petitioners," and that defendants include the whole or any unpaid balance of plaintiffs' claim "in the claims set forth and described in any resolution" passed by the Village council pursuant to the Act of July 12, 1935, for the issuance of bonds, and that they pass no resolution or ordinance providing for the issuance of bonds to pay miscellaneous debts of the Village unless they included an item for plaintiffs' claim.

Defendants contend that plaintiffs' claim was never approved

for payment by the Village council and therefore mandamus will not lie to enforce payment of an unliquidated demand, and that the finding of the court in favor of plaintiffs, to the effect that the claim had been settled, is against the manifest weight of the evidence.

Counsel for both parties agree that in the instant case the writ of mandamus could be properly awarded only on the theory that plaintiffs' bill had been approved by the council of defendant Village, and counsel for plaintiffs contend that the evidence shows plaintiffs' claim had been so approved.

The question presented must be decided upon a consideration of the evidence, from which it appears that a short time prior to July 23, 1934, plaintiffs were requested to prepare their bill for services so that it might be included in the appropriation ordinance, and pursuant to such request they prepared the bill hereinabove referred to, and delivered it on July 23, 1934, to Mr. Arch, then the Village attorney; that Mr. Arch said he wanted the bill to include all the services rendered and to be rendered in connection with the matter, and that Mr. Borden, one of the plaintiffs, told Mr. Arch that he could write any notation on the bottom of the bill that he might see fit to show that the charge was for all services rendered and to be rendered, and that the notation we have above quoted from the foot of the bill was added. Mr. Arch, called by plaintiffs, testified that on the same day, July 23, shortly after the bill was handed to him by Mr. Borden, he took it to the council meeting held in the Village hall and handed it to the Village clerk, George R. Gold; that the Village mayor, the trustees, the City clerk and the witness were all in the room in the village hall, and there was a good deal of conversation about the bill, which the witness laid on the table; that he told them he thought



the charge was not excessive; that there was a general discussion and "they said the amount was satisfactory;" that the meeting was not an official meeting of the council but was in a room upstairs in the village hall; that no vote was taken at that time; that it was usual for bills to be read at a formal meeting of the council and then assigned to the commissioners to determine whether they should be approved; that plaintiff's bill was not "O.K'd" as was the usual custom when a bill was approved; that immediately thereafter the council passed the annual appropriation ordinance carrying a total of \$272,093, in which an item of \$25,000 appears. Later on in the hearing the witness was recalled by plaintiff's counsel and testified that he had been Village attorney for eight years, and that "I examined both ordinances, appropriations and tax levy;" that the mayor had theretofore testified that only \$60,000 a year would be raised from the total tax levy, and the witness testified that the balance of the appropriation would be raised from license fees and other moneys collected by the Village. The witness further testified that on July 23, 1934, when the bill was being considered the mayor and the commissioners stated that \$25,000 was a lot of money, that it was a large fee, and that witness said, "Well, there is no doubt in my mind but that when it comes down to paying Mr. Borden the cash, if there is any question about it, I think that he will be man enough and fair enough to take less than \$25,000;" that the mayor then told the witness to "put it (the bill) away." he further testified that although the item of \$25,000 was included in the appropriation ordinance, "It doesn't mean that they have to spend the money simply because it goes into the Appropriation Ordinance. Quite frequently moneys were appropriated that were not spent as appropriated."

Otto Reich, one of the commissioners at the time, called by

plaintiffs, testified that he was present at the time the bill was presented by Mr. Arch; that the bill was discussed and the mayor turned it over to the Village clerk. The commissioners asked "where we were going to get the money for such a thing of that type *** The only thing that was said was to be sure to get it into the appropriation of special counsel fees." On cross-examination he testified, "As a rule large bills would have to be approved by the council for payment. A \$25,000 bill is a large bill to be presented to the Village;" that the custom was that all bills were audited but he did not remember whether this bill had been audited.

Kurt Berliner, who was a commissioner at the time, called by plaintiffs, testified he was present at the time Mr. Arch presented the bill; that the matter was discussed and that he understood it was approved and was to be included in the appropriation ordinance.

George Gold, the then mayor, called by plaintiffs, testified he had been mayor for eight years and continued to be such until April 30, 1935; that he was present at the meeting and that Mr. Arch brought the bill and said, "Here, I have some sad news." The witness continued, "We asked Mr. Arch whether it looked reasonable. He said he believed it was reasonable for that amount of work that was done in this case;" that no one objected to the bill; "It had to go in our appropriation that year;" that there was nothing said about the bill being approved. On cross-examination he testified that the bill for \$25,000 for attorneys' fees was unusual; that he did not know how much time Mr. Borden spent in the case; that during the time he was mayor he had an audit made every three months by a certified public accountant; that he could not recall ever seeing the item in question shown by the audit.

Harry Huxford, a commissioner at the time, called by defendants, testified he had been a commissioner since May 1, 1935,

prior to that time had been clerk and collector for the Village for twelve years; that he was present at the meeting in question when the bill was presented by Mr. Arch, who said, "This sad news is from Mr. Borden;" that the bill was then handed around to the members of the council; that they all wanted to know if the bill was not pretty high; that Mr. Arch said, "Well, we just put in the maximum amount and if this thing is all settled you won't have to pay anywhere near the amount that this bill calls for;" that Mayor Gold then folded the bill up, put it in an envelope and said to put it in a vault and forget about it until "we call for it." It was never called for after that.

Charles R. Hussey, who became mayor on the last of April, 1935, testified that prior to that date he was a commissioner of the Village for four years; that Mr. Arch presented the bill for \$25,000 and it was handed to the mayor; that "the Mayor turned red, he turned to Otto Reich and he turned white, and somebody said, 'Well, what is it?' and the reply was that it was Mr. Borden's bill for \$25,000; that there was an exclamation to the effect that the bill was very high; "there was something said about that wouldn't be the full amount of the bill, he wanted to try to get that into the Appropriation Ordinance;" that the substance of what Mr. Arch said was that the Village would not have to pay the \$25,000 but that he wanted to get it into the appropriation ordinance that night, and he sort of guaranteed to the Board that the full amount would not be \$25,000; that Mr. Arch said he was sure the bill would not be the full \$25,000; that the mayor told the clerk to put the bill away. The bill was not read at that time.

This is the substance of the evidence touching the question as to whether the bill for \$25,000 was approved by the Village officials.

We think a consideration of the evidence leads to the con-

clusion that the bill was not settled or approved in the sense that it was understood the Village would be required to pay the full \$25,000. It appears that the bill was rather hurriedly prepared by Mr. Borden so that it might be included in the annual appropriation ordinance on the afternoon of the same day on which it was prepared, July 23, 1934. The bill is in no way itemized; it does not purport to show the time counsel were engaged in the performance of their duties. It is but a general statement of the general nature of the services performed. That this was a large bill for the Village to pay for attorneys' fees is clearly shown by the testimony of all the witnesses, and that it was hurriedly put into the annual appropriation ordinance passed that day. Of course we do not want to be understood as implying that counsel has not necessarily performed a great many services for which they should be paid by the Village, but we are only passing on the question whether mandamus would lie, and since we hold the amount to be paid was not determined, it follows that the writ of mandamus was erroneously issued.

Moreover, the record tends to show that the Village officials performed all of the acts required of them by the statute. They included an item of \$25,000 to pay plaintiffs' bill in the annual appropriation ordinance; they also passed the tax levy ordinance as testified to by the Village attorney, Mr. Arch, as required by law. People v. Florville, 207 Ill. 79. But apparently the money was not collected because, as the mayor stated, the tax levy ordinance would bring in but about \$60,000, while the annual appropriation was more than \$272,000; the amount of money the Village would obtain from other sources, such as license fees, etc., does not appear. We are unable to see what more the Village officials could do in this respect, but in any event, mandamus, we hold, will not lie for the reasons heretofore stated.

1900

1

The first of the year was a very dry one, and the crops were much injured. The weather was very hot, and the ground was very dry. The crops were much injured, and the people were very poor. The first of the year was a very dry one, and the crops were much injured. The weather was very hot, and the ground was very dry. The crops were much injured, and the people were very poor.

We are also of opinion that the court erred in requiring the Village officials to include this item in any resolution the Village might pass for the issuance of bonds. They could not be compelled to issue bonds to pay this or any other indebtedness of a similar character.

The judgment of the Circuit court of Cook county is reversed and the cause is remanded for further proceedings in accordance with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and McCurely, J., concur.

39007

ALVIN MEYER,)
Appellee,)

vs.)

CHICAGO GREAT WESTERN RAILROAD)
COMPANY, a Corporation,)
Appellant.)

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

288 I.A. 616⁴

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries claimed to have been sustained by him on account of the negligence of defendant in driving one of its trains against plaintiff's automobile, injuring him. There was a verdict and judgment in plaintiff's favor for \$2000 and defendant appeals.

The record discloses that about 9:30 o'clock on the morning of August 8, 1934, plaintiff was driving his automobile south in 19th avenue in the Village of Maywood, across one of defendant's railroad tracks, when the automobile was struck by an eastbound train, injuring plaintiff. There are four lanes in 19th avenue, two for the southbound and two for northbound traffic. Four railroad tracks cross the street at about right angles. About 63 feet south of the south railroad track are two lines of the Aurora & Elgin railroad. This latter railroad crossing is protected by the ordinary gates. Defendant maintains a shanty just south of the south line of railroad and east of 19th avenue, where it employs a flagman. When trains are about to cross the tracks the flagman's duties require him to walk out into the intersection and with a "Stop" sign notify persons about to cross the tracks that a train is approaching.

There is evidence in the record, substantially undisputed, from which the jury might find that plaintiff was driving his automobile south on the inner lane used by southbound traffic; that

two or three automobiles were ahead of him and came to a stop north of the north railroad track to permit an eastbound train on that track to pass over the intersection. A southbound truck, using the west lane, stopped immediately west of plaintiff's automobile at the time. When the train had cleared the crossing the automobiles ahead of plaintiff, and plaintiff, started to cross the tracks and about this time the crossing gates, used to protect the Aurora & Elgin electric trains, were lowered because of an eastbound and a westbound electric train approaching the crossing. The automobiles ahead of plaintiff crossed over the four railroad tracks and as plaintiff was about to cross the south railroad track an eastbound passenger train, traveling at about 40 or 45 miles an hour, struck the rear end of plaintiff's car, and he was injured. The evidence also is to the effect that at the time plaintiff and the other automobiles stopped north of the north railroad track, as above stated, plaintiff looked toward the west but could not see whether a train was approaching from that direction on account of the truck in the west southbound lane; that he also looked ahead and saw the watchman, whose duty it was to notify persons about to cross the tracks of approaching trains, sitting near the shanty, which tended to indicate that no trains were approaching. It further appears from the evidence that when some of the automobiles ahead of plaintiff crossed the southbound railroad track, they were compelled to stop on account of the lowering of the crossing gates by the electric railroad. This blocked plaintiff's progress and he endeavored to turn to the west to get into a space in the west or southbound lane, but before he could do so the collision occurred. Plaintiff was familiar with this crossing and knew that a flagman was maintained to signal the approach of trains.

There is other evidence in the record describing the

situation, but we think it unnecessary to go into further details.

Defendant contends that the court should have directed a verdict for it because, "By the admitted and uncontroverted testimony of the plaintiff he was not in the exercise of ordinary care at the time of the accident and a recovery is barred." And the argument is that if plaintiff had looked to the west after he passed the truck standing in the lane to the west of him, north of the railroad tracks, he could have seen the approaching train a considerable distance away; that the uncontradicted evidence shows that when plaintiff was 80 feet north of the north railroad track he had an unobstructed view to the west of more than 1000 feet, and that when he reached a point 20 feet north of the north railroad track he could see to the west about 3200 feet, and that since plaintiff testified he did not look toward the west after he started up and passed the truck to his right, this is conclusive that he was not in the exercise of due care for his own safety. We think this contention cannot be sustained because the evidence shows that as plaintiff started forward to cross the tracks after looking toward the west, following the two or three automobiles ahead of him, he looked toward the south and saw the flagman sitting near his shanty south of the railroad tracks and east of the intersection. Plaintiff knew that a flagman was maintained at this crossing by defendant, and it was for the jury to pass on the question, taking into consideration all the surrounding circumstances, whether plaintiff was in the exercise of due care and caution for his own safety. Kelly v. Chicago City Ry. Co., 283 Ill. 640; Chicago City Ry. Co. v. Nelson, 215 Ill. 436; Wintersteen v. Nat. Cooperage Co., 361 Ill. 95.

In the Kelly case the court said (p. 645): "As a general proposition, the question of contributory negligence is one of fact for the jury under all the facts and circumstances shown by the

evidence, (Bale v. Chicago Junction Railway Co., 259 Ill. 476) but cases occasionally arise in which a person is so careless or his conduct so violative of all rational standards of conduct applicable to persons in a like situation that the court can say, as a matter of law, that no rational person would have acted as he did and render judgment for the defendant."

And in the Nelson case it was said (p. 440): "The question of contributory negligence is ordinarily a question of fact for the jury, and it only becomes a question of law where the undisputed evidence is so conclusive that the court could arrive at no other conclusion than that the injury was the result of the negligence of the party injured." (Citing cases.) "If there may be a difference of opinion on the question, so that reasonable minds will arrive at different conclusions, then it is a question of fact for the jury."

In the instant case, we think it cannot be said, bearing in mind all the surrounding circumstances as disclosed by the evidence, that all reasonable minds would reach the conclusion that plaintiff's conduct was violative of all rational standards of conduct; in these circumstances the question was one for the jury. The evidence shows that after the eastbound train on the north railroad track cleared the crossing, two or three automobiles ahead of plaintiff in the same lane proceeded to cross the tracks. He looked toward the west but his view was obstructed; he then looked toward the south and saw the flagman sitting near his shanty, from which he might well assume that no train was approaching the crossing at the time, knowing as he did that the flagman's place when a train was approaching was out in the street intersection with his "Stop" sign, signalling that a train was approaching. We think that whether plaintiff was excused from looking again to the west was a question

for the jury. Gills v. N.Y.C. & St. L.R.R.Co., 342 Ill. 458.

In that case the court said (p. 460): "It has been held that as a matter of law it cannot be said that a traveler is bound to look or listen, because there may be circumstances excusing him from doing so."

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McBurely, J., concur.

39030

CHARLES MARTINKEN,
Appellee,

vs.

TRANS-AMERICAN FREIGHT LINES,
INC., a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

288 I.A. 617¹

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries claimed to have been sustained by him through the negligence of defendant which resulted in a collision between plaintiff's automobile and defendant's truck. There was a verdict and judgment in plaintiff's favor for \$6000, and defendant appeals.

The record discloses that on June 13, 1933, at about 9:30 p. m., plaintiff was driving his Chevrolet coupe east in 59th street and defendant's chauffeur was driving one of its trucks and a trailer north in Wentworth avenue; the two vehicles collided at the intersection and plaintiff was severely injured. There were ordinary "stop" and "go" lights at the corners of the intersection.

Plaintiff's position is that he was traveling at a reasonable rate of speed as he approached and entered the intersection, and that the green lights were in his favor as he proceeded east across Wentworth avenue. On the other hand, defendant's position is that its northbound truck and trailer was being driven at a reasonable rate of speed and that when the truck entered the intersection the green lights were in its favor.

Defendant contends that the court erred in refusing to instruct the jury, at the close of all the evidence, to find it not guilty on the ground, as stated by its counsel, "that there is no evidence in the record tending to show that plaintiff was in the

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exercise of due care for his own safety at and immediately prior to the happening of the accident." In support of this counsel say, "plaintiff himself testified that when he reached the west crosswalk as he approached Wentworth avenue he looked south and saw the truck approaching; that he then started to cross and did not look again or pay any further attention to the truck;" and that plaintiff's testimony in this respect is uncontradicted. Of course, under the law plaintiff was required to prove by a preponderance of the evidence that he was in the exercise of due care and caution for his own safety before he could recover, and this would be true although defendant's chauffeur might also be guilty of negligence which directly brought about the collision.

As a general proposition the questions of negligence and contributory negligence are questions "of fact for the jury under all the facts and circumstances shown by the evidence, (Bale v. Chicago Junction Ry. Co., 259 Ill. 476) but cases occasionally arise in which a person is so careless or his conduct is so violative of all rational standards of conduct applicable to persons in a like situation that the court can say, as a matter of law, that no rational person would have acted as he did and render judgment for the defendant." Kelly v. Chicago City Ry. Co., 283 Ill. 640-645. This same rule was announced in many earlier cases by our Supreme court and in Chicago City Ry. Co. v. Nelson, 215 Ill. 436, the court said (p. 440): "The question of contributory negligence is ordinarily a question of fact for the jury, and it only becomes a question of law where the undisputed evidence is so conclusive that the court could arrive at no other conclusion than that the injury was the result of the negligence of the party injured. (Citing cases.) If there may be a difference of opinion on the question, so that reasonable minds will arrive at different conclusions, then it

is a question of fact for the jury."

Plaintiff testified that as he was driving east in 59th street, approaching Wentworth avenue, the green lights were in his favor; that about the time he reached the west side of Wentworth avenue he looked to the south and saw the truck coming north about 80 feet south of the intersection; that when he got about to the intersection the green lights turned to amber and in a second or two he was struck by the truck which collided with the rear right hand side of the automobile; that he was going about 15 miles an hour when he reached the intersection. On cross-examination he testified that when he was about at the west cross-walk of the intersection he looked up and down Wentworth avenue to see the state of the traffic; that he saw defendant's truck about 80 feet south of the intersection; (there are two street car tracks in each of the two streets); that the collision took place in the east or northbound street car track and that plaintiff was traveling in the south or eastbound track; that he was "right on the car track when the lights changed, closer to the east side of Wentworth avenue. At that time it turned amber. *** I was right there at the intersection of the northbound street car track and the eastbound street car track when I saw the light change to amber;" it was at that point that the collision occurred; that after he started across the intersection he was not watching for the truck.

Even if we consider only plaintiff's testimony in passing on defendant's motion for a directed verdict at the close of all the evidence, we think we could not say, as a matter of law, that no rational person would have acted as he did. In these circumstances, of course the question was for the jury. But in passing on defendant's motion all the evidence must be considered. And when this is done, we are clear that the question was one for the jury.

Defendant further contends that even if the court did not err in refusing to direct a verdict at the close of all the evidence, yet the court erred in not granting defendant a new trial because the verdict and judgment are against the manifest weight of the evidence.

Under the law it is the duty of this court to set aside a verdict and judgment when, upon a consideration of all the evidence, we are of opinion that the verdict and judgment are against the manifest weight of the evidence. Dunelson v. M. St. Louis Ry. Co., 235 Ill. 625, and to remand the cause. Mirion v. Forechner Contracting Co., 312 Ill. 343.

Three occurrence witnesses, plaintiff and two others, testified for plaintiff, and four for the defendant, the driver and three others.

Pete Alex, called by plaintiff, testified that he was sixteen years old at the time of the trial, which was about two and one-half years after the accident; that he has a newsstand on the southeast corner of the intersection and was selling papers at the time of the accident; that the intersection is built up and there are four stop and go lights at the corners; that when he first saw defendant's truck coming north in Wentworth Avenue he was at the southeast corner about 35 feet south of 59th street. The truck was then from 110 to 120 feet south of the intersection; that a trailer was attached to the truck which was then traveling about 25 to 30 miles an hour; that it slowed down before it reached the intersection; "As it got to the corner he had the red lights; he, the truck driver, did go through the red lights;" that the lights changed to amber before the truck reached the intersection; that he saw plaintiff's automobile when it reached the first rail of the southbound track coming east on 59th street; that the truck struck the rear hind wheel of plaintiff's automobile and pushed it around toward the

northeast corner of the intersection; (the evidence shows that the automobile was badly smashed up); that when he first saw plaintiff's car the east and west lights were green. On cross-examination the witness testified that when he first saw plaintiff's automobile it was about five feet west of the southbound street car track.

Claude Clark, an automobile mechanic who was in business for himself, called by plaintiff, testified that at the time of the accident he had been in a restaurant located three doors south of 59th street on the west side of Westworth avenue; that he walked to the corner and waited for the lights to change so that he could cross the street; that the northbound and southbound traffic lights were red at the time plaintiff was driving east in the Chevrolet automobile, and as he got to about the center of the intersection the east and west traffic light changed from green to amber; that he turned around and saw the truck about eight or ten feet from the automobile, and that it struck the automobile near the right rear fender; that plaintiff's car was "all demolished; all broke up."

Hugh Allen, called by defendant, testified that he was a painter and decorator at the time of the accident, and at the time of the trial was living in Quincy, Illinois; that he was standing at the northwest corner of the intersection and saw the collision; that he wanted to walk south across 59th street; that he first saw the truck when it was 75 to 100 feet south of the intersection and the automobile when it was a short distance west of Westworth avenue; that the truck "as it entered the intersection of 59th street, the lights were red *** and they had started to take a change;" that he thought the truck was about 50 feet south of the intersection when the lights started to change; that it was coasting along and that when it entered the intersection the north and south lights were green; that when plaintiff's automobile entered the intersection "the east and west traffic lights were absolutely red;" that the

collision took place near the middle of the intersection and the automobile was turned toward the northeast corner against a lamp post. On cross-examination he testified that he stood at the northwest corner of the intersection two or three minutes watching the traffic; that he wanted to go south but the traffic lights were against him; that when he first observed the northbound and southbound traffic lights they were red; that he did not have a chance to cross 59th street because the lights turned green and the accident happened; that the truck struck the automobile where the eastbound and northbound street car tracks crossed.

William J. Corbett, called by defendant, testified that about eight months prior to the trial he was working for the city of Chicago, bureau of streets; that just before the accident he was at the northwest corner of the street intersection; that when he first saw the truck it was 30 or 25 feet south of 59th street; that when he first saw the automobile it was about 30 to 40 feet west of Kentworth avenue; that "When the truck hit the intersection the lights changed from amber to green. When the truck went into the intersection it had the green light. When I first saw the Chevrolet it had the red light. It was about five feet from the red light;" that the Chevrolet ran through the red light into the intersection and the collision occurred right in the center.

Fletcher Ellegood, the chauffeur of defendant's truck, testified that he had been driving a truck for defendant for three years prior to the accident; that when he first noticed the traffic light at the intersection he was about 100 to 175 feet south of the intersection and the lights were then red; that he slowed down, shifting into second gear, and kept watching the lights; that when he was about 75 feet from the light it turned to amber and then to green and he speeded up and that when he entered the intersection the green light was in his favor; he was then traveling about 15

or 20 miles an hour; "I did not see Mr. Martinien's (Plaintiff's) car until he pulled directly across in front of me, or until after he entered the intersection;" that plaintiff then swerved toward the north; that the truck was straddling the east rail of the northbound track and that the accident occurred when plaintiff was crossing the north or westbound track of 59th street; that after the collision the truck and automobile were diagonally across the northeast corner of the intersection. On cross-examination he testified that he first saw plaintiff's car as it entered the intersection; that he glanced east and west but did not see anything; that the corners of the intersection were well lighted.

Each of the occurrence witnesses testified at considerable length and obviously we have not attempted to analyze all that was said. The jury saw and heard the witnesses testify and were in a much better position to determine the matter in controversy than we are in a court of review where we have but the printed page before us. They found in favor of the plaintiff; the trial Judge also saw and heard the witnesses testify and he approved the finding of the jury. We are unable to say that the finding and judgment are against the manifest weight of the evidence. In these circumstances we are not warranted in disturbing the judgment.

Defendant further contends that the court erred in refusing to give instructions requested by it and in giving an instruction prepared by the court.

The court gave four instructions requested by plaintiff and denied eight; gave five at the request of defendant and denied twelve. By the instructions the jury were told that it was their duty to determine the facts from the evidence and then to apply the law as stated in the instructions, which they should consider as one series; that plaintiff was not bound to prove his

case beyond a reasonable doubt but only by a preponderance of the evidence, and that if they found from the evidence that plaintiff had so proven his case, he was entitled to recover. The instruction explained the meaning of "preponderance of the evidence" and that the preponderance was not determined solely by the number of witnesses who testify to any particular fact or facts; but in determining that question the jury might take into consideration the number of witnesses, their opportunities for seeing and knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit. The jury were then told that plaintiff could not recover unless he was in the exercise of ordinary care for his own safety, and such care was then defined.

On behalf of defendant the jury were instructed that they should not be moved by passion or prejudice and that defendant should be treated as an individual; that plaintiff was required to prove his case by a preponderance of the evidence before he could recover; that if he had not so proved his case or if the evidence was evenly balanced or if it preponderated in favor of defendant, then the verdict should be for defendant; that if the jury believed from the evidence that "at or immediately prior to the time of the happening of the accident *** plaintiff *** was guilty of any negligence or want of care" which contributed to bring about the accident, he could not recover; that the fact that the court had instructed them on the question of damages was not to be taken as an intimation that defendant was liable.

The instructions tendered by defendant and refused by the court - which refusal defendant contends was prejudicial to it - are, as defendant has argued, numbered 25, 26, 27, 22, 23, 20,

25 and 31. By instruction 25 the defendant sought to have the jury told that in weighing the evidence they should take into consideration the fact that plaintiff was interested in the result of the suit. We think this instruction, although abstract in form, might have been given, but the jury were told that they should take into consideration the interest or lack of interest of anyone testifying, and obviously they knew that plaintiff was vitally interested in the case.

Instructions 26 and 27 were to the effect that the jury, if they believed from the evidence that plaintiff and the driver of the truck were both guilty of negligence which contributed to bringing about the accident, they could not compare the negligence of the two, but that if plaintiff were guilty of negligence which contributed to the collision, he could not recover. And that if they believed from the evidence that plaintiff by using his faculties with ordinary care, looking out for danger, could have avoided the accident, he could not recover. These instructions might also have been properly given, but the jury were instructed that their verdict should not be for the plaintiff if they believed he was guilty of any negligence at and immediately prior to the happening of the accident which contributed to bring about the collision.

Tendered instructions 28 and 29 were to the effect that the burden of proof was on the plaintiff and not on the defendant. The court, however, told the jury that plaintiff could not recover unless he had proven his case by a preponderance of the evidence; that if it were evenly balanced or if they were unable to say on which side is the preponderance of the evidence, or if they found the preponderance in favor of the defendant, plaintiff could not recover.

Offered instruction number 30 was to the effect that before

plaintiff could recover the jury must find that he was in the exercise of due care for his own safety. The question was covered because the jury were told that before plaintiff could recover they must find from the evidence that he was in the exercise of due care for his own safety.

Instruction 25, requested by defendant, was on the question as to which approaching vehicle had the right of way at street intersections. It was properly refused because that rule of law is not apt where there are "stop" and "go" traffic lights.

By tendered instruction 31 defendant sought to advise the jury that because the court had instructed them on the question of damages they could not consider it in determining that the defendant was liable. This question was covered by an instruction given.

Complaint is also made to instruction number 8, which the court prepared and gave. By it the jury were told that if they believed from the evidence that the drivers of the truck and of the automobile in question violated the ordinance concerning the "stop" and "go" light signals, then they or either of them were guilty of negligence. That if the jury believed that either of the drivers drove at a rate of speed greater than was reasonable and proper, having due regard to the traffic, etc., then they might find such driver guilty of negligence. That if they found the driver of defendant's truck guilty of negligence, the defendant was liable for such negligence.

The first objection made by defendant to this instruction is that, "It does not define in any way what does or does not constitute a violation of said 'stop' and 'go' signal but leaves it to each jurymen to formulate his own definition of what a violation is." We think there is no merit in this contention; each juror having the qualification required by the statute, we think would have no difficulty in understanding when one violates

traffic lights. The next complaint made to this instruction is that it told the jury that if they found the driver of the truck guilty of negligence, then the defendant corporation was chargeable with such negligence, because it does not limit the negligence to that charged in the complaint. We think this argument is hypercritical and without merit.

Upon a consideration of all the evidence in the case and of the instructions given and refused, we think defendant was not prejudiced. The issues were simple and easily understood; and while of course there is some error in the record, as there is in every record, we think defendant cannot say that it has not had a fair trial.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

to the

39274

JOHN RATLAWSKI,
v.
CASIMIR DYNIEWICZ, et al.,
Defendants,

APPEAL FROM INTERLOCUTORY
ORDER OF THE CIRCUIT
COURT OF COOK COUNTY
GRANTING AN INJUNCTION
AND ALSO ORDER
APPOINTING A
RECEIVER.

On Appeal of L. A. WEISS,

Intervening Petitioner, and Appellant.

288 I.A. 617²

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE
OPINION OF THE COURT.

This is an appeal by L. A. Weiss, an intervening petitioner in a foreclosure suit, from orders entered appointing a receiver for the premises involved and also an appeal from an order entered restraining further procedure in the suit of Weiss v. Stanczewski which was pending in the Municipal Court. Other parties to the suit have not filed their appearances in this court so we are not favored with any assistance through such channels.

From what we can gather from the brief and abstract filed by the intervening petitioner, a foreclosure proceeding was commenced in the Circuit Court by the plaintiff entitled, John Ratlawski, Edward O. Schoenthaler, Trustee, Plaintiffs v. Casimir Dyniewicz, et al., Defendants; that on March 4, 1935, some defendants filed a counter-claim; After issue was made up the same was referred to a master in chancery and upon his report a decree was entered on July 3, 1935, finding in favor of plaintiff in the sum of \$340 and also finding in favor of the counter-claimant Angeline Dyniewicz, a defendant, in the sum of \$3382.61 and the sum of \$250.00 as attorney's fees, and that the liens of said Angeline Dyniewicz, counter-claimant, and one Theodore Giesler are subject, junior and inferior to the lien of the plaintiff, John Ratlawski. It was ordered that the property be sold and thereafter on September 5, 1935, the master sold

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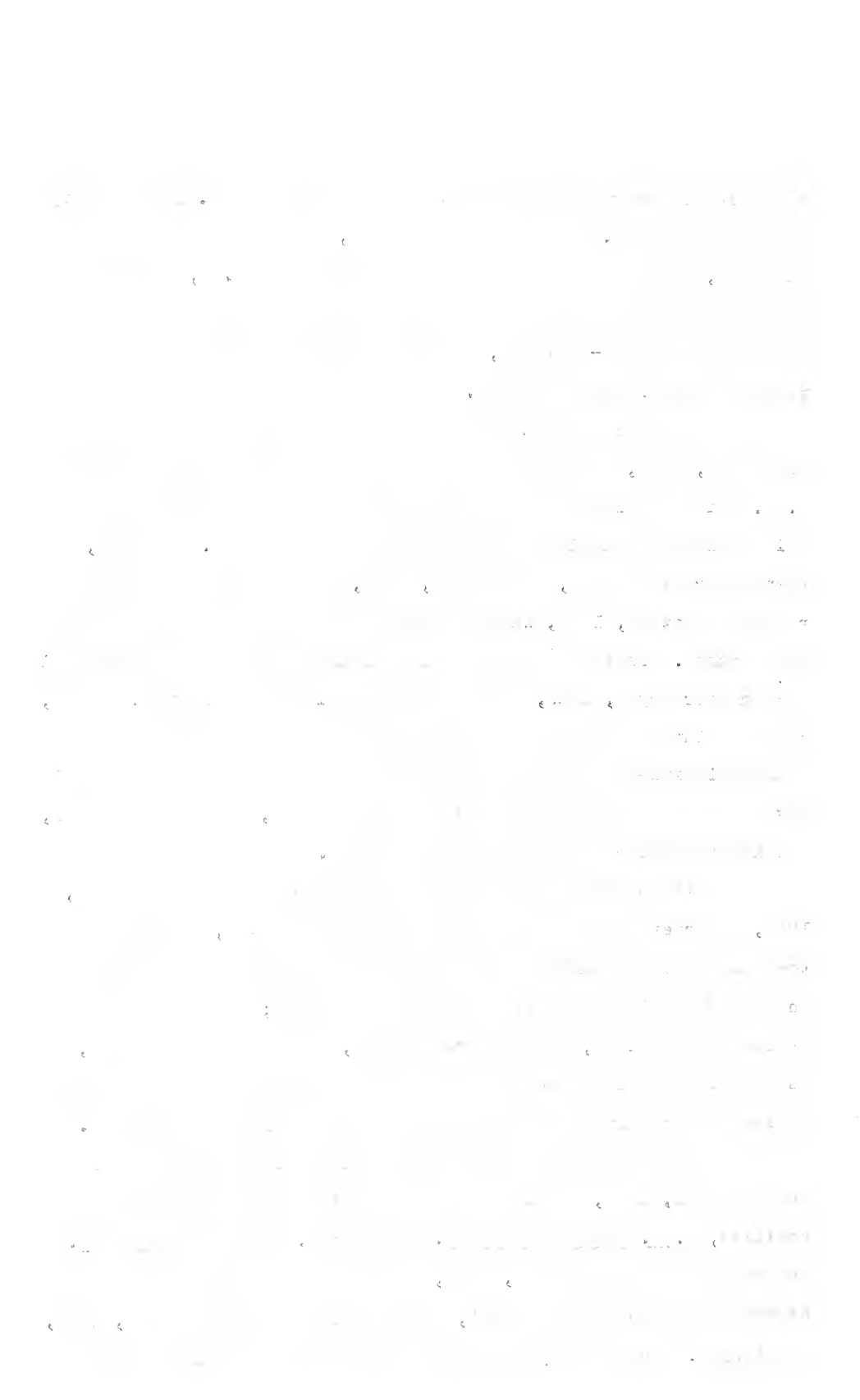
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the said property and reported the same to the court. The property was sold for \$575.00 and after the costs, fees and expenses were deducted, there was a balance due plaintiff of \$56.44, with interest thereon from the date of said sale and that the amount found to be due to the counter-claimant, Angeline Dyniewicz under said decree remains undue in its entirety.

The evidence further shows that nearly a year later on August 26, 1936, a petition was filed by the intervening petitioner L. A. Weiss setting forth that he is the owner of the equity of said real estate having purchased it from one John R. Stephens, then owner of the fee, on April 9, 1936, and the deed was filed for record August 11, 1936, in the office of the recorder of deeds of Cook County. In that petition Weiss claims that Walter Stanczewski was on February 5, 1935, appointed as receiver of said real estate, said appointment being made conditional upon the plaintiff John Ratlawski giving a bond in the sum of \$200 but that John Ratlawski never gave said bond and that the said receiver, Walter Stanczewski, was in possession and collecting the rents.

It further appears from the evidence that on August 26, 1936, an order was entered on the petition of Weiss, directing that the said Walter Stanczewski surrender possession of the premises and that he file his report in connection therewith; that thereafter a series of petitions, and answers thereto, and orders were filed, the result of which procedure was to have contempt citations issued against the receiver and others who had to do with the property.

The injunctional orders complained of were entered on September 21, 1936, enjoining the proceeding in the Municipal Court entitled, L. A. Weiss and John R. Stephens v. Walter Stanczewski. Thereafter on September 26, 1936, Weiss filed a petition for a change of venue from Judge Klarkowski, which motion on September 29, 1936, was denied. On said day an order was entered appointing Walter



Stanczewski as receiver, he being the same person who was removed from that position in July, by order of court.

Complaint is made here that the court erred in denying the change of venue. Such questions cannot be raised on an interlocutory appeal.

On the question of reviewing this appeal from the interlocutory orders, we call attention to Chapter 110, Paragraph 255, Rule 31, Ill. State Bar Stat. 1935, which is incorporated in Rule 21 of this court. The statute provides as follows:

"255. RULE 31. APPEAL FROM INTERLOCUTORY ORDERS. Where an interlocutory order or decree is entered on an ex parte application, the party proposing to take an appeal therefrom shall first present, on notice, a motion to vacate the order or decree to the trial court entering such order or decree. Appeal may be taken if the motion is denied, or if the court does not act thereon within seven days after its presentation. In such cases the thirty days allowed for taking appeal and filing the record in the Appellate Court shall begin to run from the day the motion is denied or from the last day for action thereon."

The record in this case and the abstract thereof show no compliance with this rule.

We hold that this appeal is not properly before this court, and therefore, the same is hereby dismissed.

APPEAL DISMISSED.

HEBEL AND HALL, JJ. CONCUR.

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38269

IN THE MATTER OF THE ESTATE OF
JAMES THOMAS KELLY, Deceased,

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,
v.

BELLA BUTMAN, (Impleaded)
Plaintiff in Error.

43
ERROR TO

PROBATE COURT

OF COOK COUNTY.

288 I.A. 617³

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE
OPINION OF THE COURT.

This cause comes to this court upon a writ of error issued upon the petition of Bella Batman for the purpose of reviewing the record in a contempt proceeding wherein she as respondent, together with others, was found guilty in the Probate Court of Cook County and committed to the County Jail for the period of one year unless sooner discharged in due course of law.

On April 24, 1935, on the motion of plaintiff in error, it was ordered by this court that this cause be consolidated with another cause which was in the Appellate Court, being No. 38222, entitled, The People of the State of Illinois v. Nicholas Radis, and that the record, abstract and briefs filed in cause No. 38222, be taken and considered as the record, abstract and briefs in this cause.

The evidence in the record fully discloses that the defendant Bella Butman had knowingly joined in the conspiracy to deceive the court. Among other facts disclosed by the evidence, she knew Kelly, the deceased, during his lifetime, lived with him as his wife, although she claimed to have a husband living; that she was named in the will as one of the executors, the other executor being Radis, and admitted that she signed the petition addressed to the Probate Court certifying to the validity of the will,

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although she knew it was not a valid will, asking the court to file the same for probate and recognize her and Radis as the executors of said will and give them charge of said estate; that she was present in court with the other defendants when said petition was presented. We believe Bella Butman is equally as guilty of the contempt of court as were the other defendants who were affected by the order entered in the Probate Court which was afterwards affirmed by this court and later by the Supreme Court of this State.

On April 23, 1936, an opinion was filed by Mr. Justice Hebel of this court in case General No. 38222, entitled In the Matter of the Estate of James Thomas Kelly, Deceased, — People of the State of Illinois, Defendant in Error, v. Nicholas Radis, Plaintiff in Error, in which opinion the order of the Probate Court of Cook County was affirmed. That case was taken to the Supreme Court of this State on a writ of error and the decisions of both the trial court and this court were affirmed by the Supreme Court, being Docket No. 23738 - Agenda 6, entitled, In re Estate of James T. Kelly, deceased, - The People of the State of Illinois, Defendant in Error, v. Nicholas Radis, Plaintiff in Error. Inasmuch as the facts as well as the law in the instant case are practically identical with the Radis case, Gen. No. 38222, just referred to, the opinion heretofore filed by Mr. Justice Hebel of this court, and also the opinion of the Supreme Court heretofore mentioned are controlling in the instant case.

For the reasons herein given the order of the Probate Court is affirmed.

ORDER AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that proper record-keeping is essential for the transparency and accountability of the organization. The document also outlines the procedures for recording transactions, including the use of standardized forms and the requirement for double-checking entries.

The second part of the document addresses the issue of data security. It highlights the need to protect sensitive information from unauthorized access and disclosure. The document provides guidelines for securing data, such as using strong passwords, encrypting data, and restricting access to authorized personnel only.

The third part of the document focuses on the importance of regular audits. It explains that audits are necessary to ensure that the organization's financial statements are accurate and that all transactions are properly recorded. The document also describes the process of conducting an audit, including the selection of auditors and the preparation of audit reports.

The fourth part of the document discusses the role of the board of directors in overseeing the organization's financial affairs. It states that the board is responsible for ensuring that the organization's financial statements are accurate and that all transactions are properly recorded. The document also outlines the procedures for the board to review and approve the financial statements.

The fifth part of the document provides a summary of the key points discussed in the previous sections. It reiterates the importance of maintaining accurate records, protecting data security, conducting regular audits, and the role of the board of directors. The document concludes by stating that these measures are essential for the long-term success and sustainability of the organization.

38949

MICHAL SEKELA and SUSIE SEKELA,
Appellees,

v.

BERNICE TOKARZ,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

288 I.A. 617⁴

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE
OPINION OF THE COURT.

This is an appeal from an order entered in the Municipal Court on April 23, 1936, in which order the court refused to vacate a judgment by confession entered February 7, 1934, for the sum of \$1220.50 in favor of plaintiffs Michal Sekela and Susie Sekela and against the defendant Bernice Tokarz and execution was issued thereon. Said execution was served on the defendant on March 2, 1934, to which execution she filed a schedule of her property which consisted of one wedding ring, wearing apparel and a joint interest in real estate located at 11934 Michigan avenue, Chicago, Illinois.

On April 15, 1936, defendant by notice, motion and petition asked to have the judgment vacated. The said petition after stating that the defendant had signed the note, claimed that there was no warrant of attorney authorizing confession against her alone as the note and power of attorney had been signed by defendant and her husband; that she is not indebted on said note individually and never received any consideration for jointly signing her name thereto and that no loan was made to this defendant or to Peter J. Tokarz at the time of the signing of the note; that there is no power in said note authorizing a confession against this defendant alone and prays that judgment against petitioner be vacated and set aside.

The note in question does not appear before us, except

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a/ ^{copy} attached to the affidavit of claim. No report of the proceedings was submitted by defendant when the record was filed. Later, on motion, an additional or supplemental record and abstract were filed which contained a report of the proceedings at the trial on the hearing of the motion to vacate.

The trial court certified that at the hearing to vacate the judgment the following facts were proven to have been stipulated by and between counsel for plaintiffs and counsel for defendant:

That on March 2, 1934, the defendant Bernice Tokarz was duly and personally served with an execution; that on March 9, 1934, said defendant filed her debtor's schedule, listing her property as heretofore described; that the said schedule was duly verified by said defendant before Lionel A. Sherwin, as Notary Public; that Lionel A. Sherwin was also then counsel for Peter Tokarz, husband of Bernice Tokarz, the co-signer of the judgment note involved herein;

That the said Lionel A. Sherwin represented Peter Tokarz in certain bankruptcy proceedings pending in the United States District Court for the Northern District of Illinois, Eastern Division, entitled, Peter J. Tokarz, a Bankrupt, Gen. No. 53773, in which proceeding he was afterwards discharged as a bankrupt and in that proceeding the said Peter J. Tokarz had duly scheduled said judgment as one of his debts and that the said Lionel A. Sherwin then represented said defendant Bernice Tokarz and said Peter J. Tokarz, her husband and co-debtor upon said judgment note in those certain debtor's proceedings filed in October, 1935, and presently pending in the United States District Court for the Northern District of Illinois, entitled, "In the matter of Peter Tokarz, Debtor" and "Bernice Tokarz, Debtor," bearing Gen. No. 61758 and 62089 (Consolidated) as their attorney of record in said proceedings;

That the real estate mentioned in the schedule of the execution is located at 11934 South Michigan Avenue, Chicago,

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Illinois, and described in and covered by the Torrens Certificate which property consists of a certain lot improved with a three-story building consisting of two stores and seven apartments, the original cost of which was approximately \$65,000.00; and that a first mortgage bond issue dated about June 1, 1927, in the sum of \$35,000.00 has been partially paid so that the total outstanding first mortgage liens against the said building under said mortgage now total approximately \$31,000.00, said payments having enhanced the value of the lien thereon acquired by plaintiffs through having reduced their claim to judgment, issuing and serving an execution and filing a transcript of said proceedings with the Torrens Office of Cook County, Illinois;

That since the date said judgment by confession was rendered herein, other and different debts have been incurred by each of the co-makers of the judgment note involved herein, namely, Peter Tokarz and Bernice Tokarz, and that plaintiffs herein, by virtue of having issued an execution and placed the same in the hands of the proper officer for service within one year after rendition of said judgment and having procured and filed a transcript of said judgment in the Torrens office of Cook County, Illinois, thereby secured a prior lien and preference as to the said real estate over other unsecured creditors of said Peter Tokarz and Bernice Tokarz.

There was also included in the supplemental record a certified copy issued in lieu of owners' lost duplicate certificate of title from the Torrens Office, showing the said judgment of record as a lien upon the premises.

When defendant appeared in the Municipal Court upon her motion to vacate the judgment entered against her, she did not file a special appearance but attempted to show a defense to the merits of the debt upon which judgment had been entered. This was tantamount to a general appearance and for all purposes a waiver of any right

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to object to any alleged jurisdiction over her person.

In the case of Kelly v. Brown, 310 Ill. 319, it was said:

"Jurisdiction of the subject matter cannot be waived and the question may be raised at any time, but jurisdiction of the person may be waived by making a general appearance or an appearance for any other purpose than to object to the jurisdiction, and although a defendant to an election contest expressly makes a limited appearance to object to the jurisdiction of his person, he waives such objection when he at the same time moves for a change of venue."

The petition to vacate the judgment in this case was filed over two years from the date of the judgment. No explanation is made as to why this delay occurred. The provisions of the statute limit such application to 30 days after the rendition of the judgment as set forth in Chapter 37, Par. 409, Sec. 21, Ill. State Bar Stats. 1935, as follows:

" * * * If no motion to vacate, set aside or modify any such judgment, order or decree shall be entered within thirty days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified excepting upon appeal or writ of error, or by a bill in equity, or by a petition to said municipal court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity," (McKenna v. Forman, 283 Ill. App. 606.)

The motion to strike defendant's petition to vacate the judgment was rightfully granted and the petition stricken as the petition did not set up sufficient reason to justify the court in vacating said judgment. This judgment was rendered in term time and the same presumptions will be indulged in favor of a judgment by confession entered in term time as in a judgment entered in courts of general jurisdiction by service of process. Boyles v. Chytraus, 175 Ill. 370.

A motion to set aside a judgment confessed in term time, appeals to the equitable jurisdiction of the court and even though the power of attorney was insufficient the judgment will not be set aside unless it is shown that the defendant had a legal or equitable

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defense to the debt for which the judgment was rendered. Alton Banking & Trust Co. v. Gray, 259 Ill. App. 20, affirmed in 347 Ill. 99.

In the instant case no equitable consideration appears. The judgment was duly rendered, the execution issued thereon and the defendant filed a schedule thereto as required under the statute thereby recognizing the validity of said judgment. Then the other signer of the note was discharged in bankruptcy and this defendant also applied for a discharge in bankruptcy. Two years after the judgment was rendered and the same had become a lien upon the real estate by plaintiff having filed the same in the Torrens office, the defendant without any explanation as to what caused his delay in bringing action/^{now}comes before the court with an insufficient petition and asks that the judgment be vacated.

We are of the opinion that the Municipal Court rightfully denied the petition and for the reasons herein given the order of the Municipal Court refusing to vacate the judgment by confession entered February 7, 1934, is affirmed.

ORDER REFUSING TO VACATE JUDGMENT AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

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$$f(x) = \int_0^x \frac{1}{1+t^2} dt$$

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$$g(x) = \int_0^x \frac{1}{1+t^4} dt$$

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for $x \in \mathbb{R}$. It is shown that $h(x)$ is an even function and that

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for $x \in \mathbb{R}$. It is shown that $k(x)$ is an even function and that

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SEFOIK DAIRY CO., a Corporation, WESTERN DAIRY CO., a Corporation, DOUGLAS DAIRY CO., a Corporation, HUNDING DAIRY CO., a Corporation, INTERNATIONAL DAIRY CO., a Corporation, LEMONT DAIRY CO., a Corporation, BORDEN'S FARM PRODUCTS CO., a CORPORATION, J. E. MONAHAN, Doing business as MARLEY DAIRY CO., MODEL DAIRY CO., a Corporation, MILK DEALERS BOTTLE EXCHANGE, a Corporation, UNION DAIRY CO., a Corporation, BOWMAN DAIRY CO., a Corporation, WHITE EAGLE DAIRY CO., a Corporation, WIELAND DAIRY CO., a Corporation, SIDNEY WANZER & SONS, INC., a Corporation, BOYDA DAIRY CO., a Corporation, YORE BROS. DAIRY CO., a Corporation, and UNITED DAIRY CO., a Corporation,

Plaintiffs, Appellees,

v.

JOHN JURCA, Doing Business as TURNER DAIRY,
Defendant.

JOHN JURCA and STEVE JURCA,

(Respondents) Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

288 I.A. 618¹

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

The record here contains two notices of appeal which were filed in the Circuit Court of Cook County. One was filed by John Jurca, in which it is recited that he appeals to the Supreme Court of Illinois "from the decree, order, decision and sentence of fine and imprisonment rendered and entered in this cause in the Circuit Court of Cook County on the 21st of December, 1933, and on May 22nd, 1934, wherein John Jurca was adjudged guilty of a contempt of court, and the order of the court provides that said John Jurca was fined and sentenced to imprisonment." The other notice of appeal was filed by Steve Jurca and recites that he, the respondent in the cause, "hereby appeals to the Supreme Court of Illinois from the decree, order, decision and sentence of fine and imprisonment rendered and entered in this cause in the Circuit Court of Cook County on the 21st of December, 1933, and

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on May 22nd, 1934, wherein Steve Jurca was adjudged guilty of a contempt of court, and the order of the court provides that the said Steve Jurca was fined and sentenced to imprisonment." The record containing these two notices of appeal was originally filed in the Supreme Court as one case, and respondents there raised various constitutional questions. By order of the Supreme Court, the cause was transferred to this court. No question is raised as to the fact that two appeals are incorporated in one record, and there is nothing involved here but questions of fact.

Prior to the entry of the orders referred to in the notices of appeal, and on May 24th, 1932, a decretal order had been entered in the Circuit Court, by consent of the parties, - plaintiff and defendant - to a bill for injunction theretofore filed in that court, which order, among others, contains the following recitations:

" * * John Jurca, doing business as Turner Dairy, or otherwise, defendant herein, and his agents, employees, successors and assigns, and each and all of them, be and they are hereby enjoined and restrained from the further trafficking in, handling unlawfully, dealing in, selling, giving away, using, destroying, or shipping out of the City of Chicago, State of Illinois, bottles (milk and cream) the property of the complainants, each respectively, from in any manner using, or aiding and abetting others in the use of, the brand, stamp, mark or trade-mark of the complainants, each respectively, from in any manner unlawfully interfering, or attempting to interfere with the lawful and peaceful conduct of the businesses of the complainants now being carried on by the complainants in the City of Chicago and its vicinity, or at any other place within the jurisdiction of this court, and from unlawfully taking possession of any of the complainants' bottles by purchase or otherwise."

Thereafter, and on June 10th, 1933, a petition was filed in the Circuit Court by the Sefick Dairy Co., Western Dairy Co., Douglas Dairy Co., Hunding Dairy Co., International Dairy Co., Lemont Dairy Co., Borden's Farm Products Co., J. E. Monahan, doing business as Marley Dairy Co., Model Dairy Co., Milk Dealers' Bottle Exchange, Union Dairy Co., Bowman Dairy Co., White Eagle Dairy Co., Wieland Dairy Co., Sidney Wanzer & Sons, Inc., Boyda Dairy Co., Yore Bros. Dairy Co., and United Dairy Co., complainants in the original bill

filed there, in which it is recited, among other things, that "on May 24th, 1933, a permanent injunction was issued restraining the defendant, John Jurca, doing business as Turner Dairy, his agents, employees, successors and assigns, from further trafficking in, handling unlawfully, dealing in, selling, giving away, using, destroying or shipping out of the City of Chicago, State of Illinois, bottles (milk and cream), the property of the complainants, each respectively, or from in any manner, using or aiding, abetting others in the use of the brand, stamp, mark or trademark of the complainants, each respectively, or from in any manner, unlawfully interfering or attempting to interfere with the lawful and peaceful conduct of the business of the complainants then being carried on by the complainants in the City of Chicago and its vicinity, or at any other place within the jurisdiction of this court, and from unlawfully taking possession of any of the complainants' bottles by purchase or otherwise, and that John Jurca had notice of the injunction, that the same was in full force and effect." The original injunction order was entered May 24th, 1932 - not 1933.

This petition further recites that John Jurca, doing business as Turner Dairy, together with his agents, employees, successors and assigns, and each of them, ^{and all of them,} ever since the granting of said injunction, have continually and that they are now trafficking in, handling unlawfully, dealing in, selling, giving away, using, destroying, or shipping out of the City of Chicago, State of Illinois, bottles (milk and cream) the property of the petitioners each, respectively, and are using, aiding, and abetting others in the use of the brand, stamp, mark or trade-mark of the petitioners, each respectively, and are unlawfully interfering or attempting to interfere with the lawful and peaceful conduct of the businesses of the petitioners now being carried on

by your petitioners in the City of Chicago and its vicinity, and at other places within the jurisdiction of this court, and are unlawfully taking possession of the petitioner's bottles by purchase and otherwise. And so your petitioners say that the said John Jurca, doing business as Turner Dairy, his agents, employees, successors and assigns, and each and all of them, have violated the injunction order of said court, and to respect the same they have wholly neglected and refused so to do, all of which matters and things your petitioners are ready to aver, maintain and prove, at such time and in such manner as said court may direct and appoint." The prayer of the petition is that John Jurca be punished for contempt of court, because of the violation of the injunction order, and that a capias issue to bring him before the court to show cause why he should not be punished for contempt. The statements as set forth in the petition were sworn to, as true.

On June 20th, 1933, John Jurca filed an answer to the petition, in which he pleads, in effect, that if he had been guilty of any violation of the injunction order, or that if there was any apparent violation, it was through unintentional error, or mistake. The petition and answer was referred to a Master in Chancery to take testimony. After a hearing, and the taking of testimony, the Master filed a report, in which he found, in substance, that John Jurca had committed the acts charged, and was guilty of contempt, as charged, and recommended as punishment for such violation that John Jurca be fined the sum of \$500.00, and, in addition thereto, should be imprisoned in the County Jail of Cook County for six months, or until released by due process of law. The Master's report was filed on December 8th, 1933. No objections or exceptions were made or taken to the report.

On December 21st, 1933, after considering the Master's report, the court entered a finding and order. The finding of the

court is to the effect that upon the consideration of the petition filed in the cause, and the answer of John Jurca and upon the facts shown by the evidence taken as shown by the report of the Master in Chancery, together with its finding of fact, that John Jurca, doing business as Turner Dairy, is guilty of willful contempt of the court for committing the acts charged in the petition and for willful failure to comply with the provisions of the injunction order contained in the final decree entered on May 24th, 1932. The date for the imposition of punishment was continued from time to time until May 22nd, 1934, when the court entered a final order "for commitment." This order and decree contains various findings, based on the Master's report, affirms the report, and concludes with the order that John Jurca, doing business as Turner Dairy, be fined the sum of \$250.00, and that he be committed to the common jail of Cook County for a period of thirty days from the date of commitment.

On April 20th, 1934, contempt proceedings were instituted, in the same cause, against Steve Jurca, who was associated in business with John Jurca, and there was then exhibited to the court an affidavit of A. G. Berndes. Among other things, this affidavit recites that on March 8th, 1934, on behalf of complainants, affiant went to the place of business of the Turner Dairy Company, and that on that date, he found on the premises certain crates containing bottles belonging to the Douglas Dairy Company, Kraml Dairy Company, and various other complainants in the original bill. The affidavit further recites that the affiant demanded that Steve Jurca, the respondent, surrender the bottles to the affiant, but that Steve Jurca refused to comply with the request of the affiant, and that affiant then called the attention of Steve Jurca to the injunction of May 24th, 1932, and Steve Jurca, in reply to the affiant, stated, "I don't give a dam about the injunction," and that thereupon Steve

Jurca struck the affiant and ordered him off the premises. In this affidavit Berndes further alleges that on March 10th, 1934, he again went to the place of business of the Turner Dairy Company, and that on that date, Steve Jurca was using bottles belonging to the members of the Milk Dealers' Bottle Exchange; that a Deputy Sheriff accompanied Berndes at said time and place and endeavored to take possession of these bottles, and that Steve Jurca resisted and refused to turn the bottles over. Affiant further recites in this affidavit that he asked Steve Jurca what had become of certain crates of bottles belonging to the Douglas Dairy and the Kraml Dairy which had previously been on the premises, and that Steve Jurca told the affiant and the accompanying officer, "That's our business," and refused to inform the affiant as to the whereabouts of these bottles belonging to the complainants in the case.

On a further hearing of the Steve Jurca matter in open court, the witness Berndes was sworn and testified that his duties were to collect the lost and stolen bottles on behalf of the Milk Dealers Bottle Exchange, and return such bottles to the rightful owners; that on March 7th, 1934, he was informed that the Turner Dairy had some bottles belonging to the complainants, or some of them; that he visited the place on March 8th, 1934, and found various bottles belonging to complainants; that he spoke to Steve Jurca and asked for the bottles, and that Steve said: "You can't take these bottles today, or to-morrow or any other day;" that the witness called Steve Jurca's attention to the injunction against the Turner Dairy, restraining it from using the bottles of complainants, and that Steve Jurca said: "I don't give a dam about the injunction," and that he, Jurca, then told the witness to get out of the place, or he would "knock his block off." This witness's testimony was fully corroborated by another witness. Steve Jurca denied that he had ordered the witness out of the place of business of the Turner Dairy,

or that he said: "I don't give a dam about the injunction", but admitted that he pushed the witness out, and that he refused to surrender the bottles of complainants.

The decree of May 24th, 1932, is not reviewable in this proceeding. It was entered by consent of the parties, and no appeal was taken therefrom. The testimony taken before the Master on the hearing in the John Jurca contempt proceedings, is not in the record. As stated, no objections or exceptions were made or taken by John Jurca as to the Master's report and recommendations. In his answer, he admits doing the acts in violation of the injunction, as charged. Therefore, we conclude that the court was warranted in entering the order from which the John Jurca appeal is taken. As to Steve Jurca, the court saw and heard the witnesses, and we see no reason why we should disturb the order of the court, which is justified by the evidence. Therefore, the orders and judgments appealed from are affirmed.

AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

38237

In the Matter of the Estate of
JAMES THOMAS KELLY, Deceased,

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

JOHN J. BAGDONAS, (Impleaded)

Plaintiff in Error.

ERROR TO THE

PROBATE COURT

COOK COUNTY

283 I.A. 618²

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By an order of the Probate Court of Cook County, entered on March 7th, 1935, John J. Bagdonas, plaintiff in error, Julius P. Waitches, Mrs. Bella Butman, Paul P. Zalinch, John Dailyde and Nicholas Radis were adjudged to be in contempt of the court, and it was ordered that each of the persons mentioned, be sentenced to imprisonment in the County Jail of Cook County for a period of one year from the date of the order. By writ of error, John J. Bagdonas seeks to have the order reversed.

The salient facts in this case have been considered by this court in cases No. 38222, People v. Radis, and No. 38210, People v. Waitches, in this court, wherein the judgment and sentence of the Probate Court of Nicholas Radis and Julius P. Waitches were respectively reviewed. In these cases, the judgment and order of the Probate Court were affirmed as to Radis and Waitches, and upon a review by the Supreme Court on writ of error, the judgments of this court were affirmed. By the opinions in cases No. 38222 and 38210 in this court, it is indicated that all the above named persons found guilty by the Probate Court, including Bagdonas, appeared voluntarily in that court, and voluntarily testified concerning the matters there in issue. Reference is made to the findings of this court in the ^{cases} two/mentioned. The matter before the Probate Court had to do with the alleged fraudulent execution and probate of the will

of James Thomas Kelly, deceased. It has been definitely adjudged by the Probate Court and affirmed by the Appellate and Supreme Courts that the will in question was fraudulently executed, that its filing for probate in the Probate Court was fraudulent, and that the acts of the persons mentioned in connection therewith were in contempt of the Probate Court. It only remains to be determined what part, if any, John Bagdonas had in connection with the matter. It has been determined and adjudged that the fraudulent execution of this will occurred in the place of business of Bagdonas. By this fraudulent will, Bagdonas was to receive a bequest of \$4,500 after Kelly's death, as shown by the evidence. ^{indicated by the} It is ^{indicated by the} evidence that Julius P. Waitches, an attorney-at-law, hereinbefore referred to, filled in the blank form ~~off~~ of the will referred to, in Bagdonas's place of business, which, as testified by Bagdonas, as hereinafter set forth, had been signed by Kelly before his death.

On the hearing in the Probate Court, Bagdonas, of his own volition, testified, in substance, that he was in the undertaking business; that shortly prior to Kelly's death, he went to the home of Mrs. Bella Butman, where Kelly was then residing; that he was informed that Kelly was ailing; that, together with Mrs. Butman, he purchased a printed form of a will to be executed by Kelly; that he returned to the Butman residence, and that Kelly signed the form of will upon which nothing was then written; that after Kelly signed this blank form of will, Mrs. Butman took it; that he, Bagdonas, at that time got \$200 out of \$700 from Kelly's pocket; that Kelly died on Tuesday, February 26th, 1935, and that the events just referred to took place on the preceding Saturday; that on Wednesday, following the death of Kelly, he saw Waitches with the will completely filled out, and that Waitches said in the presence of the witness, that there was between \$40,000 and \$50,000 to be had by the persons mentioned therein as beneficiaries, and

and the other

that the witness knew that \$4,500 was put in the will for the burial, and for his, Bagdonas's, services as the undertaker.

Various questions are raised in the brief filed here which are substantially the same as the questions raised by ~~xxxxxx~~ the other contemnors, both of whom were found guilty, and in which the judgment against each, as stated, has been affirmed by both this court and the Supreme Court. Bagdonas was properly found guilty by the court, and he received a just sentence.

The judgment of the Probate Court is affirmed.

AFFIRMED.

DENIS E. SULLIVAN, P.J. AND NEBEL, J. CONCUR.

38698

JOSEPH F. SANDERS,
(Plaintiff) Appellant,

v.

W. W. McCALLUM,
(Defendant) Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

288 I.A. 618³

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On May 22nd, 1933, suit was instituted in the Circuit Court of Cook County by plaintiff against defendant. By the declaration filed in the case, it is charged, in substance, that the defendant is an attorney-at-law, licensed to practice in the State of Illinois, and as attorney and counsel for plaintiff, had represented plaintiff in an action against the Belt Railway Company of Chicago in an action for personal injuries alleged to have been sustained by the plaintiff; that on January 18th, 1930, the defendant received from the Belt Railway Company the sum of \$15,000.00 in settlement of the cause; that at defendant's invitation, plaintiff went to the office of the defendant for the purpose of receiving the portion of said sum lawfully coming to plaintiff; that theretofore plaintiff had entered into a contract with defendant wherein and whereby defendant, as and for his attorney's fees in the matter, was to receive one third of the amount received in settlement of the cause, and that further, by the terms of this agreement, defendant was to pay all the expenses and costs in connection with the lawsuit and claim; that defendant informed plaintiff that he had expended various sums amounting to \$1,050.00 in and about preparing for the trial of the cause, and that after deducting such amount, defendant gave plaintiff a check for \$7,100.00. It is further averred in the declaration that, relying upon the statements of McCallum, plaintiff accepted the amount of the check tendered; that the defendant did not pay out the amount stated in preparation of the trial

2. *Chlorophyll a* and *Chlorophyll b* contents were determined by spectrophotometry using the method of Lichtenthaler and Whistler (1987).

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1. The first part of the document is a list of references. The references are listed in a table with two columns: the first column contains the author's name and the second column contains the title of the work. The references are as follows:

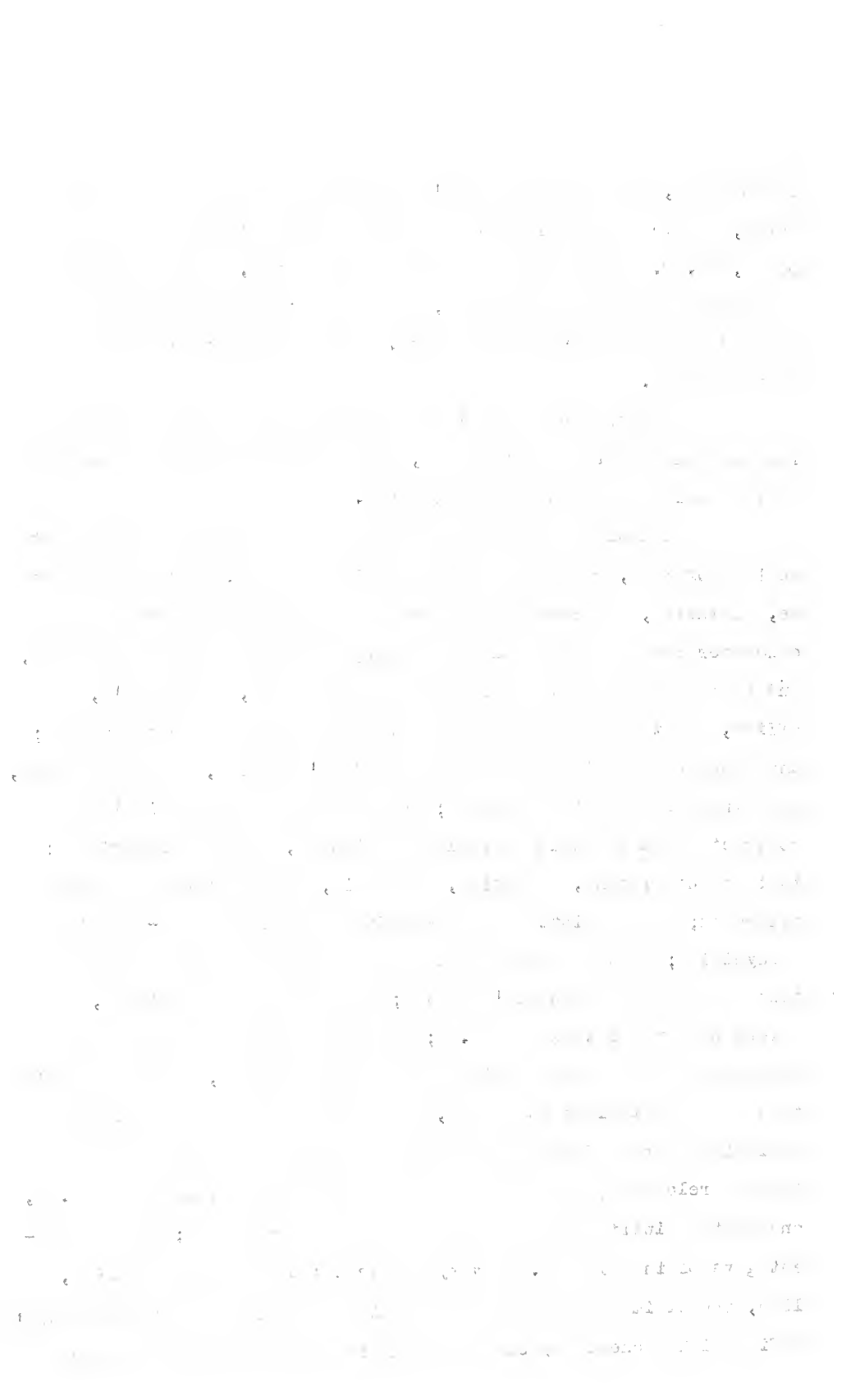
1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

... ..

of the case, and that defendant's statements in that regard were false, and that the defendant is indebted to plaintiff in the sum of \$1,020.00. The cause was submitted to a jury, which returned a verdict in favor of defendant, upon which verdict judgment was entered against plaintiff for costs. The appeal here is from that judgment.

Plaintiff urges that the court erred in giving certain instructions offered by defendant, and that the verdict is contrary to the manifest weight of the evidence.

Plaintiff testified in effect that he first met defendant in 1925 or 1926, when he was in a hospital suffering from an injury he, plaintiff, had received in the course of his employment as a conductor for the Belt Railway Company; that he called up defendant, and that defendant told plaintiff to come to his, defendant's, office, and that defendant would pay the cab fare for such purpose; that thereupon plaintiff went to defendant's office, and while there, explained his case to defendant; that defendant gave plaintiff a contract blank and told plaintiff to sign it, which plaintiff did; that at the time he, plaintiff, signed it, none of the blanks were filled in; that plaintiff was thereafter examined and "X-rayed" by a physician; that defendant again gave plaintiff cab fare for a trip to and from defendant's office; that on these two visits, defendant gave plaintiff \$120.00; that in reply to a question by defendant as to whether plaintiff had any relations, plaintiff stated that he had relations down east, and that defendant agreed to give plaintiff four or five hundred dollars so that plaintiff might go to his relations; that defendant thereafter gave plaintiff \$200.00, and that plaintiff and his wife and children went east; that defendant gave plaintiff \$100.00 every two weeks; that on January 18th, 1930, the claim agent for the Belt Railway Company came to defendant's office with a check payable to plaintiff and several other papers



to be signed; that plaintiff was present at this time and started to look these papers over, and that defendant hurried plaintiff into signing (indorsing) the check, and that plaintiff did sign (indorse) the check before he could look at the rest of the papers, together with a release; that defendant then made out a personal check for \$7,120.00 payable to plaintiff; that plaintiff and his wife were present, and that both then complained about the amount of the check; that defendant claimed there was \$450.00 which he advanced for appearing in court, \$400.00 for information received from the Interstate Commerce Commission and \$300.00 for doctors; that about a month later, plaintiff addressed a letter to defendant with reference to the alleged shortage, and that defendant told plaintiff that he, defendant, would get plaintiff a job, and that defendant frequently promised to fix the matter up. Plaintiff further testified to the effect that he reported the matter to the Chicago Bar Association, and that he hired Mr. Bloomington, his counsel in the instant case, to represent him before the Bar Association. Plaintiff then testified that subsequently he was arrested on complaint of his wife for drunkenness, and that while serving a term in jail, he wrote a letter to the defendant dated July 23rd, 1930, in which he pleaded with defendant to get him out of jail. The letter was offered and received in evidence.

On cross-examination, plaintiff identified a contract between himself and defendant dated June 19th, 1929, a copy of which was received in evidence. This document is signed by the plaintiff and recites that he employed defendant as his attorney to prosecute his claim for damages for personal injuries against the Belt Railway Company of Chicago, sustained by him on June 17th, at Clearing, and that he agreed to pay defendant as compensation for his services 50% of all moneys recovered in settlement of the claim. A notation appears on this document to the effect that the terms were accepted

by defendant. Plaintiff further testified to the effect that he could read and write English, that he had had business experience for 35 years, that he owned real estate, and that he had handled deeds to his property; that he was a careful business man, that his eyesight was good, that he read the check when he received it and before he endorsed it, and that he did endorse it. This check, which was received by plaintiff, was received in evidence, and bears on its face the following statement: "In full settlement, to my satisfaction, of my claim against the Belt Railway Company of Chicago." Plaintiff denies that this statement was on the check at the time he endorsed it.

There also appears in evidence a receipt signed by the plaintiff, as follows:

"Received from W. W. McCallum, \$7120.00, from a settlement of \$15,000.00, recovered for me from the Belt Railway Company of Chicago, for injuries I received on the 17th day of June, 1929, while employed by said railroad company.

Mr. McCallum has deducted from said settlement the following attorney's fees, which are correct, according to my contract, agreement and instructions to Mr. McCallum since I employed him to take my case, \$6,000.00, being equal to forty per cent of my said settlement, as per my contract and understanding with Mr. McCallum, and the further sum of \$1880.00 which I borrowed from James A. McCallum during the pendency of my said case, and which I instructed W. W. McCallum to deduct from my said settlement.

The above attorney's fees and loans, as deducted, are correct and satisfactory to me, and I have received in full, from my said settlement, to my satisfaction, as my share, the sum of \$7120.00.

Joseph F. Sanders

Witness: Bettye Burlingame"

On cross-examination, plaintiff testified that during all mentioned the time/prior to the beginning of the present suit, he had been friendly with defendant, that he never wrote any letters demanding money, and that at the time he wrote the letter dated July 23rd, 1930, he was friendly with defendant.

Defendant was called as an adverse witness under the provision of the Civil Practice Act. He identified the contract between himself and plaintiff hereinbefore referred to. He stated

that in connection with the matter in controversy, he paid out \$185.00 to different doctors, and that the court costs were advanced by plaintiff when the suit was started; that pending the settlement, defendant had advanced plaintiff \$1,984.00 during a period of seven months. He denied that he gave plaintiff \$500.00 to take a trip, as testified to by plaintiff. He further testified that the contract between the parties was completely filled out when plaintiff signed it, and that certain blanks therein were filled in with a lead pencil.

James A. McCallum, a brother and partner of defendant, was also called by plaintiff as an adverse witness, and testified that he filled out the contract and that plaintiff signed it in his presence; that he was present when defendant settled with plaintiff, that plaintiff agreed to accept the amount paid him in settlement, and that all the papers signed by plaintiff were drafted prior to plaintiff's signing them.

Plaintiff objects to the following instructions given on behalf of defendant:

"The court instructs the jury that fraud is never to be presumed but must be affirmatively proven by the parties alleging the same; that their dealings are in good faith and without intention to defraud, cheat, hinder, delay or defraud others; and if any transaction called in question is equally capable of two constructions, one that is fair and honest and the other that is dishonest, then the law is that the transaction questioned is presumed to be fair and honest.

The court instructs the jury that the law presumes honesty and fair dealing as between lawyer and client, the same as the law presumes honesty and fair dealings in contracts between business men, and in the absence of proof of actual fraud, by a preponderance or greater weight of the evidence, such presumption must govern you at arriving at your verdict in this case.

The court further instructs you that in determining whether or not the plaintiff executed and signed a contingent fee contract with the defendant, William Wallace McCallum, for 50 per cent of the amount recovered, you have the right to take into consideration, among other things, the conduct of the plaintiff subsequent to the execution of such contract, the final settlement, execution of release by the plaintiff, and his acceptance of the sum of \$7,120 from the defendant, William Wallace McCallum, his cashing the check for this amount without protest, if you believe from the evidence that

he signed without protest, and his conduct and relations with the said William Wallace McCallum after his receipt of the money in question, and it is your duty to determine from all the evidence in the case whether or not the plaintiff has proven his allegations of fraud by a preponderance or greater weight of the evidence. If you are in doubt or the evidence is evenly balanced, it is your duty to return a verdict in favor of the defendant.

The court instructs the jury that a contingent fee contract with a lawyer is a legal contract and in this case you have nothing to do with the question of the fairness or unfairness of the amount agreed upon between the parties if you believe from the evidence that a certain per cent was agreed upon. A contingent fee contract of a per cent of the amount recovered in a personal injury case is not unconscionable or unfair and if entered into knowingly between client and attorney, is absolutely binding and enforceable in law."

These instructions are argumentative, and should not have been given. However, upon the issues made and in view of the evidence submitted to the jury, we are of the opinion that they do not constitute reversible error.

The whole question here is one of fact. The jury saw and heard the witnesses, found for defendant, and we do not feel that we should substitute our judgment for that of the jury. Therefore, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

38732

CHICAGO TITLE & TRUST COMPANY,
as Trustee, etc.,

Appellee,

v.

EMANUEL Z. SWIMMER, et al.,
Defendants.

On Appeal of MORRIS COHN, Assignee
of the Mechanic's Lien Claim of
M. J. PLONSKER COMPANY,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

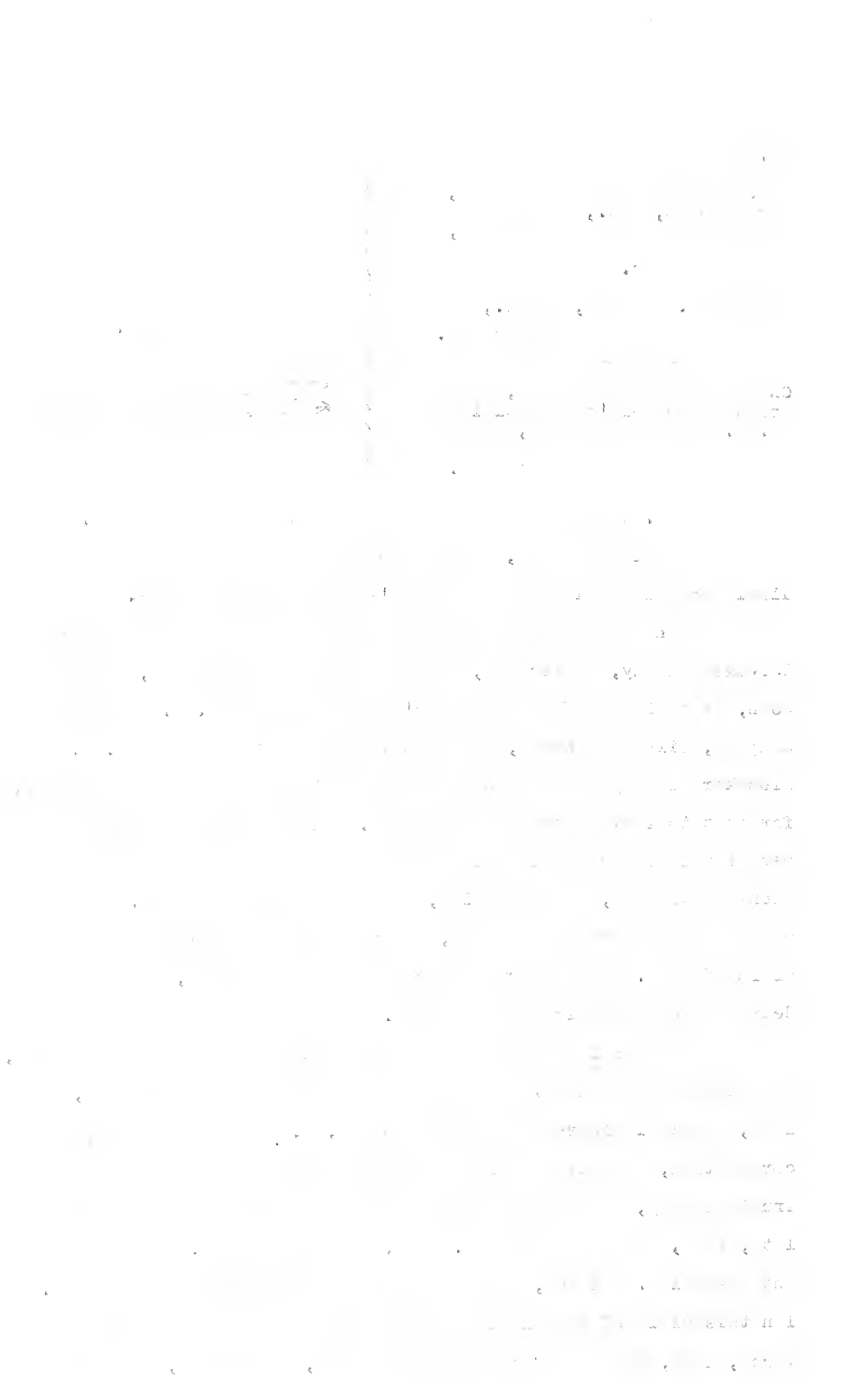
288 I.A. 618⁴

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this appeal, Morris Cohn seeks the reversal of a decree dismissing his claim for a mechanic's lien on real estate.

In a foreclosure proceeding brought by the Chicago Title & Trust Company, as trustee, under a mortgage trust deed, Morris Cohn, as assignee of the mechanic's lien claim of M. J. Plonsker Company, filed an answer, in which it is alleged that the M. J. Plonsker Company had a lien on the property sought to be foreclosed, for certain improvements made thereon. Thereafter, Cohn filed a petition in the cause in which he alleges that the claim of the Plonsker Company, a corporation, had been assigned to him. The cause was referred to a Master, who reported adversely to the claim of Cohn. The report of the Master was affirmed, and a decree entered dismissing the claim.

The claim of lien upon which Cohn bases his alleged rights, was filed in the Circuit Court of Cook County on September 3rd, 1929, and it is therein set forth that M. J. Plonsker Company, a corporation, asserts a claim for lien against the Home Bank & Trust Company, as trustee under a Trust Agreement dated December 19th, 1928, known as Trust No. 1339, against Jacob H. Schwimmer and Emanuel Z. Swimmer, and against certain described real estate. In this claim of lien it is asserted that on the 20th day of March, 1929, the Home Bank & Trust Company, as trustee, was the



owner of certain real estate described in the trust agreement, and that Jacob H. Schwimmer and Emanuel Z. Swimmer were the beneficiaries under this trust agreement, and the equitable owners of the real estate; that on March 20th, 1929, Jacob H. Schwimmer and Emanuel Z. Swimmer, with the knowledge, consent, permission and acquiescence of the Home Bank & Trust Company, made an oral contract with the claimant, by the terms of which claimant agreed to furnish labor, materials, equipment and supplies for a system of refrigeration in and for an improvement upon the premises conveyed in the trust deed and included in the trust agreement, for a consideration of \$1,700.00, to be paid to the claimant by Jacob H. Schwimmer and Emanuel Z. Swimmer upon the substantial performance by the claimant of the contract; that in pursuance of the contract, the claimant corporation furnished to, upon and for the improvement upon the premises mentioned, labor, materials, equipment and supplies for a system of refrigeration, and completed the contract on or about June 21st, 1929; that Jacob H. Schwimmer and Emanuel Z. Swimmer had paid to the claimant \$250.00 on account of the contract, and that there is due and unpaid the sum of \$1,450.00.

The record indicates that the corporation, claimant, was incorporated on July 21st, 1929, that the contract to do the work was made by M. J. Plonsker in his individual capacity, and that the work was done by Plonsker and not by the corporation. It is the claim of Cohn, however, that while the original contract for the making of the improvement in question was made with M. J. Plonsker, individually, the claim based thereon, was assigned to the corporation after the work was completed and after the corporation was formed. The evidence offered in support of this latter contention is that, in the Articles of Incorporation of the M. J. Plonsker Company, in reciting what the capital stock of the corporation should be, the following statement is made as to certain properties described as making up a portion of such capital stock:

"Accounts receivable, work in process, tools, patterns, good will, and any other miscellaneous assets of the present M. J. Plonsker Company, a sole proprietorship doing business at 608 W. Randolph Street, Chicago, Ill."

Prior to entering upon the work of installing the refrigeration machinery, a document dated March 21st, 1929, was presented to Jacob H. Schwimmer by M. J. Plonsker, which is designated as a "proposal", and which contains, among other things, certain specifications for the installation of the refrigeration machinery and equipment proposed to be installed in the premises at 4453 Diversey Avenue, - the property in question - for the "price" of \$1,700.00. The "proposal", among other items, contains the following:

"Title. The title to the apparatus and machinery covered by this proposal and specification shall remain in the M. J. Plonsker Company until all payments hereunder, including all deferred payments, whether evidenced by notes or otherwise, shall have been fully paid in cash. Purchaser also agrees to do all acts necessary to perfect and maintain such retention of title in the M. J. Plonsker Company."

This "proposal" was not signed nor formally accepted in writing by Jacob H. Schwimmer and Emanuel Z. Swimmer. There is no question but that the refrigeration plant was installed, as alleged.

The Master's report contains a finding that the work performed and the materials furnished are not lienable, that the evidence did not show that the work performed and materials furnished enhanced the value of the premises, and that under the terms of the contract entered into on March 29th, 1929, the materials and equipment furnished did not become and were not fixtures permanently attached to the premises sought to be foreclosed, but were at all times, and are now, personal property.

As stated, it is insisted by the owners of this property that the installation of this refrigeration plant did not enhance the value of the real estate. While there is some testimony by a real estate opinion witness that there was an enhancement of the value of the property by the installation of this plant, still the

weight of the evidence is to the effect that it did not do so. It is shown by the evidence, and not denied, that the plant did not work properly, that considerable sums of money were spent by the owners in attempting to make it operate, and that notwithstanding such expenditures, it did not perform as it should. There is also considerable testimony to the effect that this refrigeration plant did not become a permanent part of the real estate. It is in evidence, and not denied, that all the machinery composing the plant, could be easily and readily removed without damage to the real estate.

While, as stated, the "proposal" submitted was not formally accepted by the owners in writing, still it is shown that the refrigeration plant was installed in substantial conformity with the specifications contained in this "proposal", and that the price to be paid therefor is the price fixed by the proposal, and, less the amount paid, is the amount claimed.

We are of the opinion that this "proposal", under the circumstances, became the contract between the parties, and that the seller, the original claimant here, by its terms, never parted with the title to the plant. In view of this and of all the other facts and circumstances in the case, we are further of the opinion that the decree of the Circuit Court should be, and it is affirmed.

AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

38735

NELLIE I. FENDER and FRANCIS R. FENDER,
(Plaintiffs) Appellants,

v.

IRA N. FENDER and FRANCIS M. FENDER, as
Executors, and IRA N. FENDER and WILBUR
G. FENDER,

(Defendants) Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

238 I.A. 619¹

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree sustaining a motion to strike and dismissing the cause of the plaintiffs under their amended bill of complaint, wherein plaintiffs prayed for a construction of certain provisions of the will of Elmer E. Fender, deceased.

The amended bill of complaint on behalf of the plaintiffs, filed on July 30, 1935, alleged in substance that Elmer E. Fender, late of the City of Chicago, County of Cook and State of Illinois, died on the 29th day of December, 1934, leaving a last will and testament, dated December 4, 1934, which was duly admitted to probate by the Probate Court of Cook County, Illinois, on the 3rd day of January, 1935; that letters testamentary were duly issued to Ira N. Fender and Francis M. Fender, the same being parties defendant herein and a son and brother respectively of said deceased; that the said executors accepted the duties imposed upon them by said will, and have been and are now acting in said capacity as executors; that among the assets of said estate are a going grocery and market business, and a building and other realty used by and appurtenant to said business; that among the assets of said business are accounts receivable of \$19,000., a stock in trade and supplies inventoried at \$5,410.32, fixtures inventoried at \$2,341.05, delivery trucks inventoried at \$350, and the good will attached to said business as a going concern, the value of which is not less than \$20,000.

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That on January 25, 1935, Nellie I. Fender, one of the plaintiffs herein and surviving wife of said Elmer E. Fender, renounced the provisions made for her in said will by an instrument in writing duly executed and filed in the Probate Court of Cook County, Illinois.

That on March 21, 1935, a day subsequent to said renunciation, the said Ira N. Fender, defendant herein purported to exercise an option created by the second provision of said will and to purchase thereby the said business and all the assets thereof in their entirety, to lease said store premises in the entirety, and to obtain all the income and profits arising from, by and during the operation of said business by said executors.

That in pursuance of said purported election to purchase and lease, said Ira N. Fender has paid or proposes to pay to the estate, in either cash, notes, or both notes and cash, a sum equal to the total book value of said fixtures, delivery trucks, stock in trade and supplies as shown by the testator's books at the date of the testator's death, the said sum being less than \$10,000 in total amount.

It is further alleged that said Ira N. Fender, by said purported election to lease and purchase, has neither paid nor proposes to pay to the estate any sum for the accounts receivable, good will and going business values of said business.

The material parts of the second provision of the will of Elmer E. Fender, deceased, the subject of this litigation, provide as follows:

"that my son, Ira N. Fender, be permitted to purchase from my estate the accounts, due at the date of my death, stock in trade, fixtures, delivery wagons or trucks, and all other utensils and equipment, good will and going business of the grocery and market now conducted by me under the name of Longwood Grocery and Market, together with the shares of stock which I own in the Central Wholesale Grocery, at the book value of said stock in trade, fixtures, delivery wagons or trucks, utensils and equipment as shown by my books at the date of my death; the purchase price to be paid at the rate of Five Hundred Dollars (\$500.00) or more per year with

interest at the rate of five (5) per cent per annum, the same to be evidenced by the personal notes of my said son; said notes may be distributed in kind as a part of my estate.

My said son, Ira N. Fender, shall have a period of three (3) months from the date of my death in which to elect whether or not he will purchase the assets of the aforesaid business on the terms above set forth; and my executors, hereinafter named, are hereby given full power and authority to continue the operation of my said business during said three (3) month period, and, in the event of my son's election to purchase, for such further period as may be necessary for the consummation of such transaction.

It is my wish and I hereby direct that the purchase of the assets of my said business by my said son shall be subject to the current debts and obligations of the business which he shall assume and pay in due course and that he shall receive the benefits derived from the operation of the business by my executors from the time of my death to the time of his election to purchase.

* * * that my said son be permitted to lease the premises now occupied by said store for the term of ten (10) years at a monthly rental of One Hundred Twenty Five Dollars (\$125.00) per month."

By the will of the testator the power granted to the executors is in these words:

"I hereby give my said executors, and the survivor of them, full power and authority to sell or lease, without order of court, any property, whether real or personal, belonging to my estate for the purpose of carrying out any provision of my will and to carry on my said business as hereinbefore provided. I also give my said executors, and the survivor of them, full power and authority to settle and compound any claims either in favor of or against my estate as to my said executors shall seem best, and, for the purposes aforesaid, to execute and deliver all proper and necessary conveyances and to give full receipts and discharges."

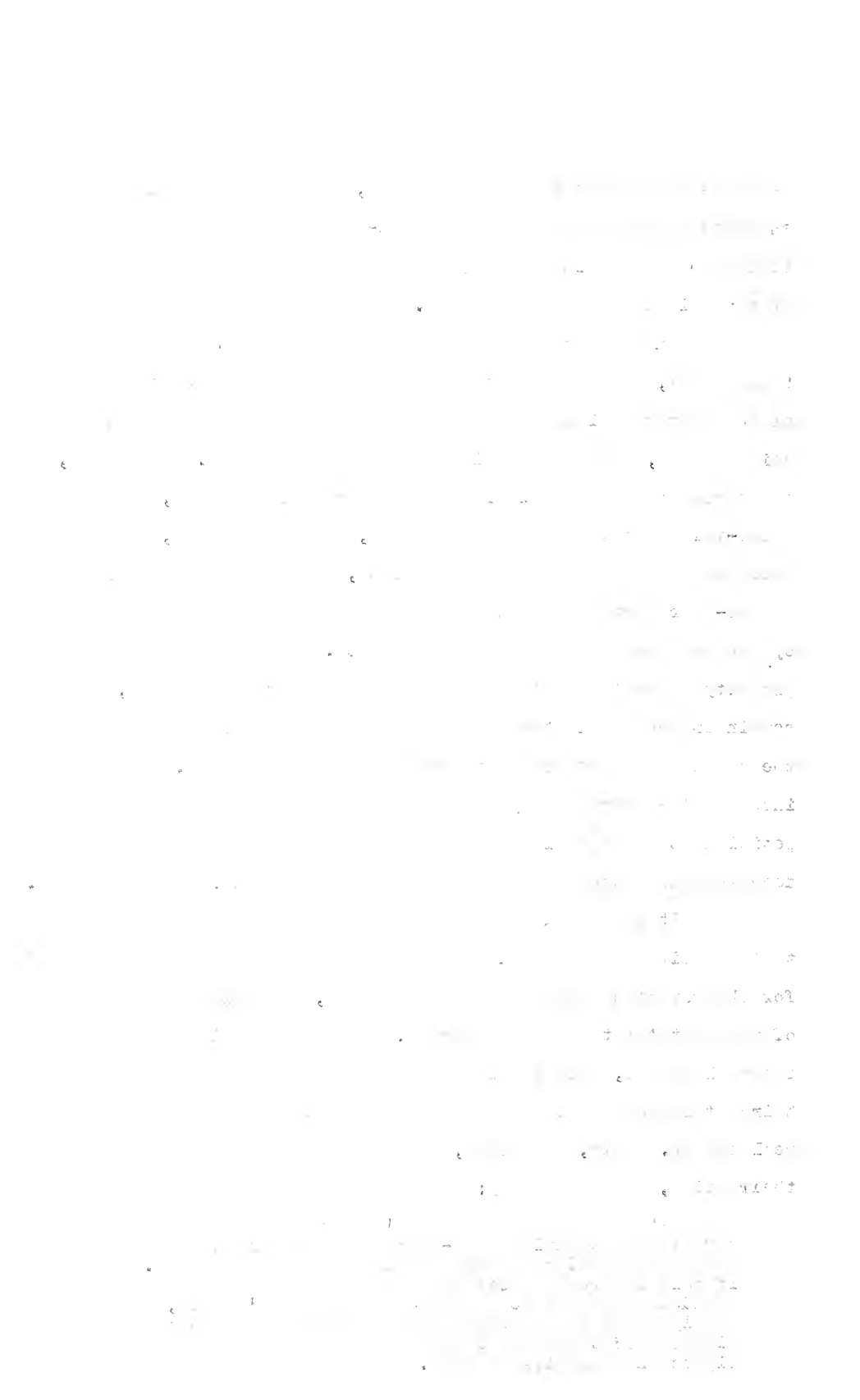
Plaintiffs by the amended bill pray that in accordance with such construction and legal effect, the respective interests of the parties hereto, in and to the assets affected thereby, be determined, declared and decreed to be as follows: (a) that Nellie I. Fender is entitled to and has an absolute one-third (1/3) interest in the realty and a one-third (1/3) interest in either the personalty or the fair market value thereof; and (b) that Ira N. Fender, Wilbur G. Fender and Francis R. Fender, as residuary

legatees and devisees under said will, are each respectively entitled to and have an absolute two-ninths ($2/9$) interest in the realty and a two ninths ($2/9$) interest in either the personalty or the fair market value thereof.

In the disoussion of the questions which arise upon this appeal, we must take into consideration that upon the death of the testator title to the real estate vests immediately in his heirs at law, unless otherwise provided in the will. The widow, by reason of her renunciation of the terms of the will, becomes a one-third owner of the realty where, as in this case, there are children of the testator and the widow, and she also is entitled to one-third interest in the personal property owned and possessed by the testator at the time of his death. The title to the personal property is vested in the executors upon their appointment, to remain in them until the payment of debts and a distribution of the remainder of personal property to the next of kin. The only interest the executor may have in the real estate is the power to petition that the real property be sold to pay the debts of the deceased where the personal property is not sufficient to pay them.

It is not clear from the powers granted to the executors that the title to the real estate vests in them as trustees to hold for the purposes provided for in the will, and while it is the wish of the testator that his son Ira N. Fender be permitted to lease the real estate, this leasing would have to be consented to by the heirs at law of the testator who are invested with title to the real estate. This, in effect, is admitted by the defendants in their brief, where they say:

"It may be that the widow's renunciation which vested her with an undivided one-third of the real estate prevents the exercise of the option to lease the real estate. Even if this is true it does not warrant the maintenance of the amended complaint to construe the decedent's will, it merely makes the parties to the proceeding tenants in common with regard to the real estate and leaves them to their rights and remedies as such."



By reason of this fact it became necessary from the allegations of the bill to construe the will and determine whether the executors are vested with power to enter into such a lease with the defendant Ira N. Fender.

It is true that in construing the last will and testament of Elmer E. Fender, now deceased, we consider the document from its four corners and determine from the language used the intent of the testator. It is apparent it was his wish that his son Ira N. Fender be permitted to purchase the grocery business upon terms provided for in the will, and if the terms of the will meet the requirements of the law in the distribution of his property, then of course the court would say so in construing the language used by Mr. Fender. It is well settled that by the renunciation of the widow she takes what is provided for by law, and so far as she is concerned, the estate would be an intestate one, and she no longer bound to accept any of the provisions of the will.

A great deal has been said with reference to the method of arriving at the price to be paid by Ira N. Fender for the property in question. The testator had the right to indicate that the price to be paid by the beneficiary would be the book value shown by the books of account of the testator at the time of his death. This question was solved by the court in the case of Daly v. Daly, 299 Ill. 268, wherein an option to purchase given by will was approved. In that case the testator chose to fix the price of the land definitely in his will by naming a specified price. Nothing in the case indicates he could not have fixed the price in some other way.

The defendants rely in a measure on the case of Magin v. Miner, 110 Md. 299, which is also cited by the plaintiffs, where it appears that an option provided for in the will fixing the purchase price by something outside the will was clearly sustained. The testator created an option to purchase at a price to be fixed by

2. *Chlorophyll a* and *Chlorophyll b* were determined using the method of Arar and Collins (1987).

• *Journal of the American Medical Association*, 2000; 284: 2611-2616

$\frac{1}{\sqrt{\pi}} \int_{-\infty}^{\infty} f(x) e^{-x^2} dx = \frac{1}{\sqrt{\pi}}$

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appraisement of the land but did not designate any appraiser or method of selecting such appraiser. The court there said:

"The privilege of buying at an appraised value out of the open market might be a valuable one, and the testator clearly intended that the two sons named should have this advantage."

and held that the failure of the testator to designate appraisers or to fix a method of selection should not deprive his sons of the advantage he intended they should have. The court appointed appraisers; the appraisement was made, and the will of the testator carried out. It would seem that the law applicable in that case would apply to the case at bar, namely, that the testator has the right to provide for an option in his will which would benefit, as in this case, a member of his family, and by that option require that the price to be paid for the assets be determined from the value appearing upon the books of the testator at the time of his death.

Other questions are raised on this appeal, but we believe there is sufficient in the bill to warrant the court in construing the language of the various provisions and in determining from the will itself the purpose the testator had in mind when he executed the will.

Having sustained the motion to strike the amended bill, and plaintiffs electing to stand by such amended bill, the court erred in dismissing the bill for want of equity.

The comment we have made is only for the purpose of passing upon the question of whether the court erred in sustaining the motion to strike, and it will be necessary for the trial court to consider the various elements which may arise upon a hearing, and determine what construction is necessary to properly carry out the intention of the testator.

The decree of dismissal is reversed and the cause remanded.

DECREE REVERSED AND CAUSE REMANDED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

38784

FLORENCE E. HIRT,
(Plaintiff) Appellant,
v.
A. J. SCHANFARBER,
(Defendant) Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

288 I.A. 619²

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

Upon application of the plaintiff this court allowed an appeal from a judgment entered in the Municipal Court of Chicago for the defendant in a suit instituted by the plaintiff, wherein plaintiff sought, as assignee, to recover from the defendant on five promissory notes, two in the sum of \$4,500 each, and three in the sum of \$450 each.

The statement of claim alleges that the notes were executed for and on behalf of the defendant by G. E. Mann, who was employed as his stenographer, and that the defendant also endorsed said promissory notes; that these notes were made and executed in Ohio, and were secured by a mortgage on real estate located in that State; that there had been a default and a foreclosure, and that plaintiff was seeking to recover the balance due after allowing all credits. At the time of the trial it was alleged there was due the sum of \$2,484.49.

The defendant filed his affidavit of merits setting forth failure of consideration, in that the payee of the notes, which were non-negotiable, had failed to fulfill certain covenants in the purchase of real estate, the notes being part of the purchase price; that there had been an accord and satisfaction, and that the defendant had suffered damages in excess of the amount alleged to be due, on account of the breach of the covenants of plaintiff's assignor. Upon a trial by the court, a jury having been waived, judgment was entered for the defendant.

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10. Die zehnte Aufgabe ist die Bestimmung der

The deed conveying certain lots, which was received in consideration of the execution and delivery of the promissory notes by the defendant, contained the following provisions:

"Said Grantors agree as part of the consideration for this conveyance, to install and pay for the grading and sidewalks in front of all of the lots deeded herein, the grading to be completed on or before December 1, 1926, and the sidewalks to be fully completed on or before May 30th, 1927.

As a further consideration for this conveyance, the said Grantors agree that they will cause the proper authorities to lay sewer and water in front of all of the lots deeded herein and will cause the proper authorities to pave the streets upon which all of the sublots front, the cost of the said sewer, water and paving to be assessed back upon the property described herein."

There is evidence by the defendant that before the plaintiff acquired the non-negotiable notes she was fully informed that the instruments were given in part payment of vacant lots and that the deed required the grantor to install said improvements. Defendant testified that before plaintiff purchased the notes, Mr. Weitz, agent of the plaintiff, discussed the purchase with the defendant; that Weitz said he was negotiating with the payee to acquire the notes, and the defendant called his attention to the fact that the notes were non-negotiable and that he had made them non-negotiable because the payee was obliged to put improvements in the property. From the further evidence of defendant it appears that he informed Weitz that if the improvements were not completed, he would not pay the notes, and if Weitz intended to buy the notes he should make sure that the improvements would be put in. It also appears from the evidence that the improvements were never put in, and that the fair cash market value of the lots would be \$1,000 per lot with the improvements, and \$100 per lot without the improvements. In the record there is no evidence offered on behalf of plaintiff which disputes or contradicts defendant's testimony as to the damages sustained as a result of the breach of the covenant to furnish the improvements.

It appears from the evidence that a settlement agreement

was entered into between the plaintiff and the defendant, which agreement consists in part of a letter dated January 5, 1931, written by Weitz to Schanfarber, the defendant, in New York. The letter is as follows:

"Confirming my conversation with you please be advised that settlement of the Hirt and Lichtig claims by the payment of \$1,600 in full will be satisfactory. This amount is to be paid in monthly installments of \$100.00 each, the first payment of which I have already received through Ulmer, Berne and Gordon. I, of course, understand that, in the event you are unable in any one month to make a payment, this payment will be deferred for another month, but I do not want you to take advantage of this as the matter has now been dragging for some time and I do not want to be obliged to make any more explanations to my clients as to why the money is not forthcoming."

The defendant contends that the letter from Weitz to the defendant does not set forth all of the terms and agreements, and therefore "should not be given real consideration". To this contention the plaintiff replies that it is true that this letter does not embody all the details, but it does embody two essential features which clearly show that there was no intention to accept the promise to perform as satisfaction for the debt, unless the payment of the \$1,600 was received in full. There seems to be no dispute as to the payment of the \$1,500 to plaintiff's attorney, the amount in dispute being the \$100, which plaintiff contends has not been received by her.

The defendant's evidence is to the effect that in May or June, 1932, he delivered to his attorneys Boskey & Schiller, in New York, the final payment of \$100.

There is also in the record a letter from Boskey & Schiller, dated July 11, 1932, and addressed to plaintiff's attorneys, that upon receipt of the required releases and satisfactions they would deliver to plaintiff's attorneys a check for the \$100 balance due under the settlement agreement. The defendant testified that the \$100 which he delivered to these attorneys for release and satisfaction required according to his attorneys' letter to plaintiff's attorneys,

was never returned to defendant. While there is some dispute in the testimony as to when this last payment was made, still it was a question for the trial court, and it is not for this court to consider the credibility of the witnesses or determine the weight of the evidence. However, we are of the opinion that there is sufficient in the record to sustain the finding of the court on this question.

The plaintiff, upon the ground that the settlement agreement was not satisfied by the defendant, seeks to recover the balance due upon the notes in question, after allowing credit for the \$1500 paid on account of the compromise entered into by the parties. It is worthy of note that this compromise agreement was made not alone to satisfy the claim of the plaintiff, but also that of Helen Lichtig, who was represented by the same counsel, and that counsel sent the letter to the defendant regarding their acceptance of the amount offered in settlement of their claims.

There is no doubt that there was a bona fide dispute between the plaintiff, the defendant and Helen Lichtig, and irrespective of what the result may have been regarding defendant's claim for recoupment for damages sustained, the adjustment was entered into. The courts are inclined to encourage the compromise of a claim between litigants, and from the facts as we have them before us, it is apparent that the defendant endeavored to comply with the agreement to pay the amount agreed upon.

The \$100 balance due is still on deposit with the attorneys, as far as the record shows, and of course plaintiff's attorneys are entitled to this money whenever they comply with the request that the notes be produced and cancelled so that the litigation between the parties will end.

The plaintiff, however, suggests that a fact, which appears in the record, is entirely overlooked by the defendant that in 1929,

he reconveyed the property in question to the Memphis Realty Company, and at the time of the reconveyance received a second mortgage on the real estate in part payment. Assuming this to be true, it would have no material bearing on the question of liability of the parties on the notes. If the defendant had a claim against the Memphis Realty Company, he would be privileged to adjust it with this Company irrespective of the outcome of the litigation between the parties in this case. Therefore we do not see how a claim of the defendant against the Memphis Realty Company could affect the interests of the various parties in the instant litigation.

Another question raised by the defendant is the sufficiency of the affidavit to plaintiff's statement of claim, but in view of our conclusions expressed in this opinion, it will not be necessary to pass upon this point.

The judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

39024

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

BERNARD M. STONE,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

288 I.A. 619³

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This cause is in this court upon a writ of error by the defendant to review the judgment entered in the Municipal Court of Chicago upon the finding by the court that the defendant was guilty of operating or driving a motor vehicle upon a highway within the corporate limits of the City of Chicago, knowing that due to his negligent driving of the motor vehicle an injury had been sustained by Joan O'Connor, and of leaving the place of the accident without stopping and giving his name, the street number of his residence, and the motor vehicle number, to Bernice O'Connor or to any police officer, nearest police station or judicial officer, contrary to the statutes of the State of Illinois. The court sentenced the defendant for a period of thirty days in the County Jail of Cook County.

The facts are that the defendant on April 15, 1936, was backing his automobile out of a private driveway across the sidewalk on Kimbark Avenue between 52nd and 53rd Streets, in Chicago. The evidence of the child Joan O'Connor is: "I am four years of age. I went to the store with my mother and walked out of the store and as I was walking on the sidewalk on Kimbark Avenue where there is a blind alley, I was struck with the front part of the automobile and knocked down. My leg was scratched. I ran to the store where my mamma was." The child's mother, Bernice O'Connor, testified that she was 40 feet away in the store, and did not see what happened to the child; that the child came running into the store, and that she

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70. The sixty-eighth

71. The sixty-ninth

72. The seventieth

73. The seventy-first

74. The seventy-second

75. The seventy-third

76. The seventy-fourth

77. The seventy-fifth

78. The seventy-sixth

79. The seventy-seventh

80. The seventy-eighth

81. The seventy-ninth

82. The eightieth

83. The eighty-first

84. The eighty-second

85. The eighty-third

86. The eighty-fourth

87. The eighty-fifth

88. The eighty-sixth

89. The eighty-seventh

90. The eighty-eighth

91. The eighty-ninth

92. The ninetieth

93. The ninety-first

94. The ninety-second

95. The ninety-third

96. The ninety-fourth

97. The ninety-fifth

98. The ninety-sixth

99. The ninety-seventh

100. The ninety-eighth

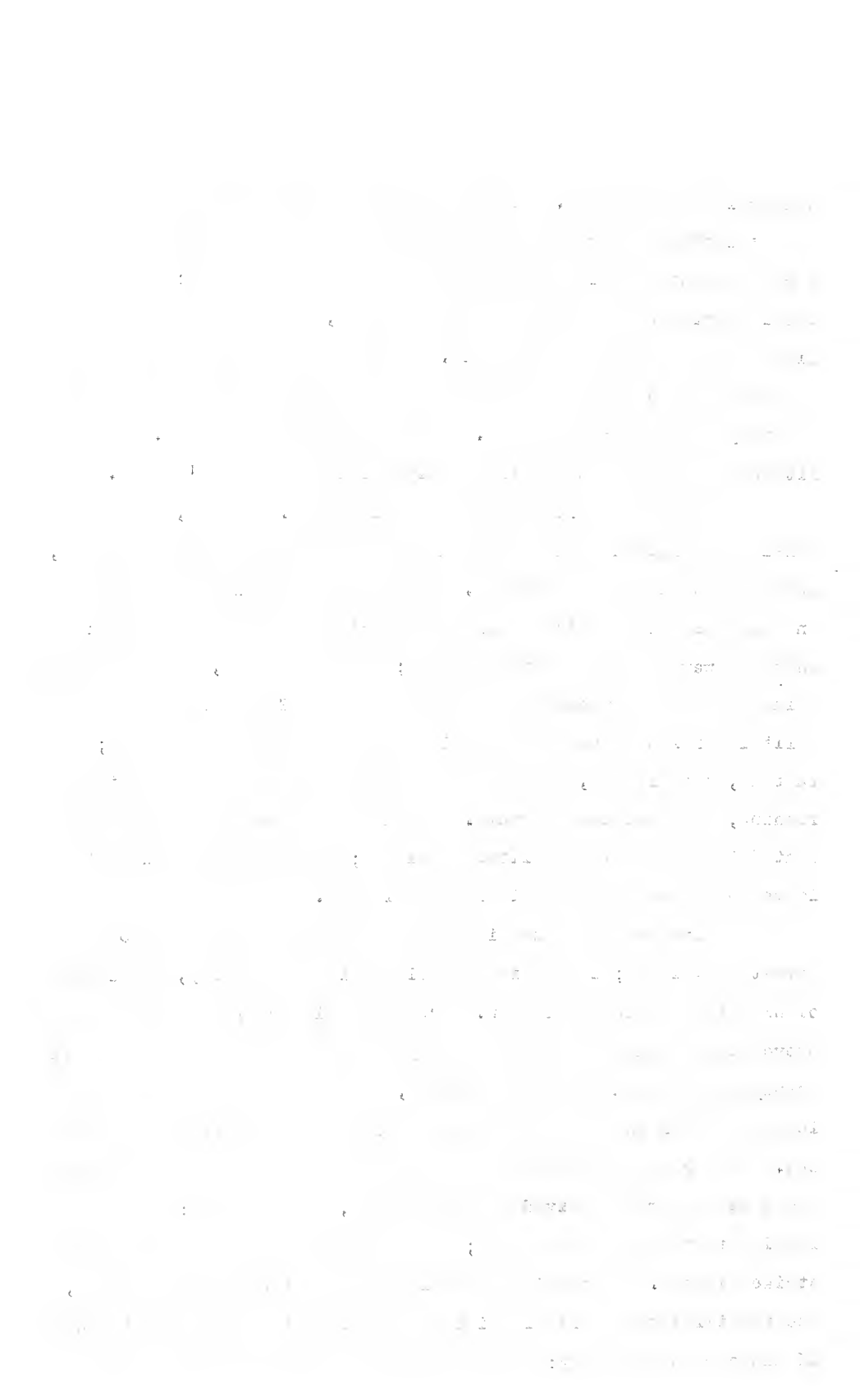
101. The ninety-ninth

102. The hundredth

had bruises on her leg. Witness Robert Kellner testified he was at the northwest corner of 53rd street and Kimbark Avenue and saw the defendant standing with his automobile at the alley; that a little girl ran away from the alley crying, and he obtained the license number of the automobile. He further testified that there was another man with the defendant and defendant motioned for him to hurry and get into the car. Then defendant drove away. The little girl he saw at the time he identified as Joan O'Connor.

The defendant offered as a witness S. Strauss, who was walking on Kimbark Avenue between 52nd and 53rd streets in Chicago, on the west side of the street. This witness testified that he saw an automobile in a private alleyway backing across the sidewalk; that he waved to the driver to stop; that he did so, and the witness walked up to the automobile and told the man (Stone) in the car that a little girl had run into the right front fender and ran away; that he, the witness, called to the girl to stop but she continued running, and went into a store. Defendant got out of the car and wanted to know where the little girl was; that defendant did not leave the scene of the accident immediately.

The defendant testified that he lived at 846 East 52nd Street in Chicago; is married and lives with his family, consisting of his wife and four children. From his evidence it appears that he drove his car into the private alleyway on the west side of Kimbark Avenue between 52nd and 53rd streets, and stopped in the alley and looked through the rear window to see if it was all right to drive out. He further testified that he started to back out and a man by the name of Strauss waved to him to stop, which he did; that he was looking to the rear of the car; that he did not see or feel anyone strike his car. He testified he did not know the witness Strauss, who testified that a little girl had run into the right front fender of his car and ran away; that he returned later with his car and



drew a diagram of the alley; that after talking to Mr. Strauss he went around the block looking for the little girl; parked his car and stood on the corner to see if he could see this little girl, and after that he got into his car and went home.

The record does not show that the court questioned this child four years of age as to her qualifications to testify as a witness. Her evidence is rather unusual for a child of her age. The defendant is charged with the commission of a crime, and such violation must be established beyond a reasonable doubt. The evidence contained in the record does not establish that the defendant beyond a reasonable doubt unlawfully, knowingly and wilfully left the place where the accident occurred.

The witness Kellner, who stood at the corner of 53rd street and Kimbark Avenue, was able to obtain the license number of defendant's automobile. This, together with all the facts, would not indicate that defendant drove away from the scene of the accident in violation of the law. Comment, however, is made by the State's Attorney in his brief upon the statement of the defendant to officer Goles, after the accident and at the station, in which he admitted that he knew he struck the girl and that he did not stop. The accident as described to him by the witness Strauss was such that this admission alone would not indicate sufficient to justify defendant's conviction.

Taking all the evidence in the record into consideration, the facts do not show a violation was established beyond a reasonable doubt.

The defendant calls other questions to the attention of this court, but in view of our conclusion, we do not deem it necessary to consider them.

The judgment is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

Figure 1. The effect of the concentration of the H_2O_2 solution on the amount of the released H_2O_2 from the H_2O_2 -loaded hydrogel. The amount of the released H_2O_2 was measured by the amount of the released H_2O_2 from the H_2O_2 -loaded hydrogel. The amount of the released H_2O_2 was measured by the amount of the released H_2O_2 from the H_2O_2 -loaded hydrogel.

GEORGE MALLEK, a Minor, by
ANTOINETTE SHERMAN, his next
friend and mother,

Appellee,

vs.

ALBERT J. STULTS,

Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

288 I.A. 619^a

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

In an action on the case for personal injuries and upon trial by jury, the defendant, at the close of all the evidence, made a motion for an instructed verdict. The court reserved its ruling, submitted the cause to the jury which returned a verdict for plaintiff in the sum of \$1000. Defendant then made a motion for judgment notwithstanding the verdict, which was denied; the court also denied the motion made for a directed verdict at the close of plaintiff's evidence, overruled defendant's motion for a new trial, and a further motion for a new trial on the ground of alleged newly discovered evidence, and entered judgment upon the verdict, to reverse which defendant appeals.

It is argued that the court erred in denying defendant's motion for judgment notwithstanding the verdict because plaintiff was guilty of contributory negligence as a matter of law, in the giving of certain instructions to the jury at plaintiff's request, in denying the motion for a new trial on the ground of newly discovered evidence. It is also argued the judgment is contrary to the law and manifestly against the weight of the evidence.

The evidence shows (as the declaration alleges) that plaintiff, then a boy 15 years of age, was severely injured on July 11, 1934, as a result of being struck by a Buick automobile owned and driven by defendant. The accident occurred at about 7:30 a. m., at or near the intersection of an alley and Paulina street, about 125 feet north of the intersection of Paulina street and Montrose

avenue in Chicago. Paulina street is a public highway running north and south; Montrose avenue a public highway running east and west. At the time in question a grocery store stood at the northeast corner of the intersection of Montrose avenue and Paulina street. The building in which it was conducted was a three-story brick, covering the entire lot. On the east side of Paulina, 125 feet north of the intersection, was an alley running east and west, which was from 12 to 15 feet wide, and about 150 feet east of Paulina this alley was intersected by another alley running north and south in the rear of buildings which fronted west on Paulina. The neighborhood was densely populated.

Defendant on this particular morning was about to do some decorating in his home at 6743 Maple Square avenue. Shortly after seven o'clock a. m. he drove to the rear of the home of Otto J. Anderson, who was to assist him in doing the work. Anderson's home was at 4555 North Paulina street. They placed some material in the automobile, Anderson also got in, and defendant Stults drove the automobile south in the alley running in that direction, then turned west in the alley leading west to Paulina street. The exact place where the accident occurred is in controversy - plaintiff contending that he was struck while crossing the alley on the sidewalk running north on the east side of Paulina street, while defendant contends he was struck before the automobile reached the sidewalk.

Plaintiff was accompanied by another boy, Edward Hodor, 13 years old. Plaintiff lived in Chicago, but on the night previous to the accident came with his companion Hodor from Berk River, Michigan, and arrived at the intersection of Montrose avenue and North Paulina street at about the time the automobile was being driven through the alley. By reason of the building, however, they could not see the automobile and its occupants could not see them.

In front of the store each of the boys helped himself to a box of strawberries, then both boys ran north on the east side of Paulina street. Hodor says he grabbed the strawberries and ran, putting the strawberries in his sweater; coming to the alley he turned east into it; plaintiff was following; Hodor turned into the north side of the alley, and he says he went about 10 feet when he heard plaintiff cry out; he says that he passed the automobile when he turned; he did not see it; he was in a hurry to get away; he did not see any automobile pass him; he stopped on hearing plaintiff cry and looking back saw him lying next to the building, south of the alley, with part of his body against it; he did not see the automobile strike plaintiff and does not know how far plaintiff was from the automobile. He says plaintiff was lying right back of the left front wheel of the automobile. Hodor further testified that the rear end of the automobile was past the sidewalk; that it was past the building line where the building comes up to the sidewalk, but he did not know how far. The men got out, picked up plaintiff, put him in the automobile; Hodor also got in, and plaintiff was taken to the hospital.

Plaintiff testified that he and Hodor had come on Montrose avenue to Paulina; that after taking the strawberries both of them ran toward the alley; Hodor was in front of him about 15 feet. They were running pretty fast toward the alley; that then Hodor got to the alley, he turned into it and ran east; that plaintiff was following him but was going across the alley and not going into it. Plaintiff says he did not want to go into the alley but intended to run farther down the block toward the north where he saw an empty lot. He says he did not turn to go into the alley at all. He had been around the locality only once or twice before, but says he could see the empty lot, and that his idea was to turn into it and not go down the alley. The next thing he knew the automobile hit him and threw him to the ground.

Anderson, the decorator, who was riding with defendant, says that at the time they turned to drive west in the alley approaching Paulina street they were going about 10 to 12 miles an hour but slowed down to about 5; that they were about 4 to 6 feet coming toward the sidewalk of Paulina street when the boy turned into the alley and ran right in front of the car, and after him came another boy and turned into the alley and ran right into the car, running into the left front wheel. He says the automobile was at that time from 4 to 6 feet from the sidewalk and was going "around 5 miles per hour"; that the boy^{that} ran into the alley passed the car in front of it and ran on the north side of the car or the right side of it. The other boy ran into the alley and took about four steps when he came directly in front of the automobile. He says the automobile stopped at once; that the front wheel at that time was about 3 feet away from the wall of the building; was at least 4 feet east of the sidewalk on Paulina street. Plaintiff, he says, was lying even with the front wheel with his back against the wall; his legs were even with the front wheel; he took plaintiff up and carried him into the car, and the first thing plaintiff said was, "It's my fault;" plaintiff said they had taken a box of strawberries and were running away from the store.

Defendant says he was driving in a westerly direction ~~in~~ the alley; that his speed did not exceed 10 to 12 miles at any time; that he slowed down as he approached Paulina street and was going to stop at the sidewalk as he had done many times before; that the first thing he saw was plaintiff coming around the north corner of the building, the extreme northwest corner where the alley and sidewalk intersect; that he came around the corner running; that as he came around the corner the automobile was 6 or 7 feet from the corner. He says his best judgment is that

at the time plaintiff came around the corner the automobile was going 3 or 4 miles an hour, and that when he stopped the car after it struck plaintiff the front wheels of the car were probably 2 or 3 feet (possibly a little more or less) from the building line on Paulina street, and that at no time did the automobile reach the sidewalk at the end of the alley. He did not recall seeing the other boy until after he got out of the car; that plaintiff was lying in the alley just even with the front hub cap of the front wheel when he was picked up. Plaintiff was taken to the Ravenswood hospital. It is not denied that his injuries were severe.

It is conceded the court erred in giving to the jury, at plaintiff's request, an instruction to the effect that while as a matter of law the burden of proof was upon plaintiff, and it was for plaintiff to prove his case by a preponderance of the evidence, still, if the jury found that the evidence bearing upon plaintiff's case preponderated in his favor "although but slightly," it would be sufficient for the jury to find the issues in his favor. This instruction was criticized in Molloy v. Chicago Rapid Transit Co., 335 Ill. 164, and the judgment was reversed there, although not solely because of this instruction. In other cases the instruction has been criticized, but the giving of it held not to be ^{necessarily} reversible error. Costello v. Federal Life Insurance Co., 259 Ill. App. 321; Wilson Brothers v. Haeger, 261 Ill. App. 568; Gebhardt v. Village of LaGrange Park, 268 Ill. App. 556. The instruction should not have been given.

Defendant contends that plaintiff was guilty of contributory negligence as a matter of law, and that for that reason defendant's motion for judgment notwithstanding the verdict and his motion at the close of all the evidence for an instructed verdict in his favor should have been given.

There is much in the narrative of the occurrence, as given by plaintiff and his companion, which is highly improbable. In view of all the circumstances under which the accident took place, plaintiff's recital of his determination to carry the strawberries he had taken to a vacant lot rather than to follow his companion down the alley is quite improbable, and the evidence as to the position in which plaintiff's body was found after the accident is not consistent with his testimony that he was proceeding northward across the intersection of the alley and Paulina street when he was hit. The taking of the strawberries was not directly a part of the accident, but it is important as bearing upon the credibility of the testimony given by plaintiff and his companion.

The question of the negligence of defendant was, under the evidence, for the jury; but on the theory of either plaintiff or defendant, and whether plaintiff turned and followed his companion eastward into the alley or ran north across the sidewalk, all reasonable persons must, we think, conclude that his own negligence directly contributed to the injury he sustained, and that plaintiff was therefore, as a matter of law, guilty of contributory negligence which prevents recovery on his suit. The motion for a directed verdict in defendant's favor at the close of all the evidence should have been granted, and it was error to refuse it. The judgment is therefore reversed without remanding the cause.

REVERSED.

O'Connor and McSurely, JJ., concur.

ERNEST J. KRUEGEN et al.,
Appellants,

vs.

GENERAL OUTDOOR ADVERTISING
CO., et al.,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

288 I.A. 619⁵

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiffs from a decree in equity which dismissed their bill. The cause was heard upon the plaintiffs' exceptions to the report of a master. The exceptions were overruled and the decree entered as recommended. The bill was brought to secure an injunction restraining defendants from constructing or permitting to be constructed two advertising sign boards on premises at the northeast corner of Sheridan Road and Castlewood Terrace in Chicago, for the reason as alleged, that the construction would violate building restrictions of record.

Sheridan Road is a public highway on the North side of the City of Chicago and extends in a general north and south direction. Castlewood Terrace is a public highway extending east and west, which intersects Sheridan Road. Its western extension ends at the intersection; thence it runs eastward (formerly to the lake, but now to a new road extending north and south along the border of the lake and known as the Outer Drive). The extension of Castlewood Terrace east and west is about 1100 feet. North of and parallel with it is Ainslie street. The lots on the south side of Ainslie abut the lots on the north side of Castlewood Terrace. On the south side and parallel with Castlewood Terrace is LaFayette Parkway. The lots on the north side of LaFayette Parkway abut the lots fronting on the south side of Castlewood Terrace. The proposed sign boards were to be located on the premises described as Lot Number 41 except the east 30 feet thereof, and Lot Number 42 of

Castlewood Subdivision. These lots lie on the north side of Castlewood Terrace, fronting south, and are immediately adjacent to Sheridan Road on the west. The frontage of the lots on Sheridan Road is 114 feet; on Castlewood Terrace 70 feet. The defendant James C. Wilson holds the legal title to these lots. The beneficial owner is the American Motorists Insurance Company, for which the title was acquired by purchase of the equity from the former owner in 1935. The premises at that time was incumbered by a mortgage in the principal amount of \$20,000, which the American Motorists Insurance Company purchased in 1927. All of Castlewood Terrace is located in Castlewood Subdivision, consisting of 87 lots bounded on the west by Sheridan Road, on the north by Ainslie street, on the east by the Outer Drive extending along the shore of Lake Michigan, and on the south by LaFayette Parkway. May 8, 1896, this entire subdivision was conveyed by the then owner, Henry J. Peet and wife to the Title Guaranty and Trust Co. in trust, to whose rights the Chicago Title & Trust Company succeeded by merger or consolidation. All of the lots fronting on Castlewood Terrace, which are numbered 22 to 64 inclusive, were thereafter conveyed by the Chicago Title and Trust Co. as trustee to purchasers by deed, each of which contained restrictions, which were to be binding upon the heirs, successors and assigns of the vendee. The material restrictions are:

"2. That no building (except bay-windows, porches, porticos and front doorsteps) shall be built or maintained upon said lot between the building line laid down and designated on the recorded plat of said subdivision and any part of the street designated on said plat as Castlewood Terrace.

"3. That no buildings (barns, stables and necessary outhouses excepted) shall be built or maintained on said real estate, or any part thereof, unless such building at the time it shall have been built or placed on said real estate shall have cost and been worth at least \$5,000.00.

"4. That no more than one building to be used for a dwelling shall at any time be erected or maintained upon the lot above described.

"5. That no apartment or flat-building or structure built, used or adapted for the separate housekeeping of more than one family shall at any time be built or maintained upon said lot.

"6. That no building or structure built, used or adapted for a livery stable or for conducting any kind of business shall be built or maintained upon said lot.

"7. That no building or structure at any time built or maintained on said lot shall be occupied or used for a livery stable or for conducting any kind of business."

These restrictions did not cover the entire Castlewood Subdivision but only those lots fronting on Castlewood Terrace.

All of the lots located on Castlewood Terrace were conveyed prior to April 5, 1923, subject to the building restrictions, and prior to the passage of any zoning ordinance of the City Council of the City of Chicago affecting this territory. It was evidently the intention of the subdividers to create on Castlewood Terrace an exclusively residential district. That result has been substantially attained. There have been erected upon these lots homes which vary in cost from \$10,000 to \$100,000. Plaintiffs, at the time they purchased, knew of the restrictions and acquired their properties relying upon the same. When the subdivision was originally created the property included therein, as well as surrounding real estate, was undeveloped and consisted for the most part of vacant sand and prairie land. Thereafter, in 1900, the Elevated railroad was built to Wilson avenue, which is a few blocks south of Castlewood subdivision. The construction of the road resulted in a substantial increase in real estate values and in the rapid development and improvement of the area including this subdivision. After the construction of the Elevated to Wilson avenue the population increased. Sheridan Road, on which traffic theretofore was for the most part carried on by horse-drawn vehicles, became a congested highway on which all sorts of conveyances are used, and is at present one of the most travelled streets in Chicago. However, the traffic has been somewhat lessened recently by the construction

of the Outer Drive. The character of the occupancy of Sheridan road has also changed from that of a strictly residence district into a thriving and important business section, improved with stores and apartment buildings.

On the lots in question, now held by James C. Wilson, was formerly erected a dwelling house. The evidence does not disclose at what cost. However, it was allowed to come into a state of disrepair. Later it was demolished and wrecked. The premises are now vacant.

June 2, 1926, Harry G. Will, the then owner of these premises, and Frank Cuneo, who was the owner of property on Castlewood Terrace directly south of and across the street from the Wilson property, filed a bill of complaint in the Circuit court of Cook county against all of the owners of property on Castlewood Terrace, praying that these building restrictions be held null and void and removed from the records as clouds on their titles. The cause was prosecuted to a final decree, which was entered on February 15, 1929. This decree is in evidence, finds the issues for the defendants, holds the restrictions valid and in full force and effect. Plaintiffs there prosecuted an appeal to the Supreme court of Illinois. The cause is reported in Cuneo v. Chicago Title and Trust Company, 337 Ill. 589. The Supreme court affirmed the decree of the Circuit court, held the restrictions valid and in full force and effect. The opinion in that case was filed December 20, 1929. Rehearing was denied February 8, 1930.

March 20, 1935, defendant General Outdoor Advertising Company made an application to the Building Department of the City of Chicago for permission to construct two advertising sign boards at 4865 Sheridan Road, being upon the premises in question. The application asked for permission to erect two sign boards, each 10 x 30

feet in dimension, each 12 feet high and of a total area of 720 square feet. The permit was issued by the Building Department June 13, 1935, and grants to the Lumbermen's Mutual Casualty Company permission to erect these sign boards as requested in the application, each sign board to have an area of 300 square feet. The testimony shows that the insertion of the name of the Lumbermen's Mutual Casualty Company in the application for a permit was by error; that the sign boards were not intended to be used by the defendant General Outdoor Advertising Company in the usual course of its advertising business, but the intention was to enter into a contract with the Advertising company for the construction of these sign boards, to the end that the sign boards might be used in advertising the business of the American Motorists Insurance Company, which is the real, beneficial and equitable owner. These facts were established by the testimony of Mr. Morris C. Flanagan, who is employed by James S. Kemper and Company, which is an insurance managing institution operating a large number of subsidiary companies engaged in the insurance business. These companies are at least fifteen in number, and one of the subsidiaries is The American Motorists Insurance Company, defendant. The Lumbermen's Mutual Casualty Company, however, belongs to the same combination as the American Motorists Insurance Company.

The total lineal frontage on Castlewood Terrace on both sides of the street is about 2450 feet. Plaintiffs are owners of approximately 550 feet of this frontage. The Wilson lot represents a Castlewood Terrace frontage of 70 feet. The residences of plaintiffs located on Castlewood Terrace are of considerable value. Plaintiff Ernest J. Krueger has resided in his home on this street for the last 12 years; his residence cost \$100,000; plaintiff Boehne, a business man, has resided on Castlewood Terrace for 32 years, and has invested in his home from \$35,000 to \$40,000; Mr. Linton, another

plaintiff, is a broker who has resided on this street for 13 years and has invested \$40,000 in his home; Mr. Piper has been a resident on the street for 15 years and made an investment of \$40,000; Mr. Maltman, a resident for 27 years, has an investment of \$75,000; Mr. Riesenhus has been a resident for 22 years with an investment of \$35,000; Mrs. Hyde, a resident for 13 years, with an investment of \$66,000; Mr. Bourassa, a resident for 21 years, with an investment of \$17,000; Mr. Lower, a resident for 32 years, with an investment of \$10,000. While the evidence does not specifically disclose the actual value of all the premises to be affected, it would seem that the amount involved in residential values is about \$1,000,000.

The bill in this suit was filed September 26, 1935. The amended complaint was filed October 25th thereafter. The zoning ordinance of the City of Chicago permits the erection of signs on property located as this is. There is a large sign board 12 x 100 feet on the premises directly north of these lots; a sign board 12 x 50 on the west side of Sheridan Road facing the west end of Castlewood Terrace. There are some other signs in the neighborhood, but there are at present no sign boards actually located on Castlewood Terrace.

The original bill prayed that the zoning ordinance might be declared void. In the course of the hearing plaintiffs abandoned this prayer and in their second amended complaint omitted any reference to the zoning ordinance.

Plaintiffs argue that every question in this case, with the exception of whether the proposed sign boards fall within the terms of the restrictions, has been settled adversely to the contentions of the complainants in Cuneo v. Chicago Title and Trust Company, 337 Ill. 589. They point out that in that case the bill was filed

by the then owners of the premises located at the southeast and northeast corners of Castlewood Terrace, thus involving the identical property and the identical restrictions here involved. A careful reading of the opinion discloses that many of the questions arising on the record were considered by the Supreme court in that case. While the proceedings are both equitable in their nature they are in some respects dissimilar. The former case involved the question of removing all these restrictions as to all the lots. This suit concerns only the two lots adjacent to Sheridan Road. The former suit was one to quiet title. This ^{is} one asking the benefit of the extraordinary remedy of an injunction. In the former bill the defendants relied upon their strict property rights. In this bill plaintiffs ask affirmative relief in a proceeding where the granting of such relief lies in the sound legal discretion of the Chancellor. While the former decree does not adjudicate the rights of the parties as disclosed by this proceeding, the opinion of the court in the former case is persuasive although not controlling. In a proceeding of this kind each case must be decided with reference to its own particular facts and circumstances. O'Neill v. Wolf, 338 Ill. 508.

The argument of defendants seems to assume that the fact (as claimed by them) that it is the intention to use the sign boards only in furtherance of the business of defendant owners is of some importance. We are of the opinion that this fact, if such it is, is not material. If the erection of the proposed sign boards will in fact violate the terms of the restrictions, the question of whether the use is to be for the owner or some other person matters very little. In either case the purpose for which the easement was created would be destroyed. Indeed, the primary object in imposing the restrictions was to limit the uses to which the owners themselves might devote their property.

Defendants contend here, as plaintiffs contended in the Cuneo case, that the surrounding conditions have changed so materially as to render the enforcement of the restrictions inequitable. The master found in favor of the defendants as to this contention, reciting the present conditions and comparing same with the conditions which existed at the time the restrictions were imposed, as heretofore narrated. It does not appear that the general situation has changed materially in this respect since the decision in the Cuneo case. In that case the Supreme court stated the rule to be:

"That equity will not enforce a restriction where, by the acts of the grantor who imposed it or of those who derived title under him, the property and that in the vicinage has so changed in its character and environment and in the uses to which it may be put as to make it unfit or unprofitable for use if the restriction be enforced, or where to grant an injunction against violation of such restriction would be a great hardship on the owner and of no benefit to the complainant, or where the complainant has waived or abandoned the restriction. Evertsen v. Gerstenberg, 136 Ill. 344; Star Brewery Co. v. Primas, 163 id. 652; Trustees of Columbia College v. Thatcher, 87 N.Y. 311; McArthur v. Hood Rubber Co., 221 Mass. 372, 109 N.E. 162; Page v. Murray, 46 N. J. Eq. 325."

The Supreme court then was of the opinion that the facts and circumstances proved as to changed conditions were not sufficient to justify a disregard of these restrictions. We think the evidence in the present case shows that the situation has not materially changed in this respect since the Cuneo case was decided. These restrictions were imposed for the purpose of protecting the homes of these plaintiffs from deterioration as the result of such changes. The changes were not unforeseen; could have been easily forecast by any one familiar with the development of real estate projects in Chicago. Changes have taken place in the neighborhood but not in the restricted district itself except as to these lots. Thus far the restrictions seem to have accomplished the purpose for which they were designed. The necessity for the restrictions is now more apparent than hitherto. This is no sufficient reason for destroying them. O'Neill v. Wolf, 333 Ill. 508; Drexel State

Bank of Chicago v. O'Donnell, 344 Ill. 173. It may possibly be true that these particular lots are more valuable for business than for residence purposes, but defendants purchased at a comparatively recent date and with full knowledge of the restrictions. They are not now, in order to realize the greatest possible benefit from the use to which their property may be put, entitled to destroy restrictions which are invaluable to others, and which were imposed by common consent. O'Neill v. Wolf, 333 Ill. 506; Reed v. Hazard, 187 Mo. App. 547 (174 S.W. 111). It is perhaps true that the best use to which these particular lots can be put is a commercial one, but this is not sufficient. Turney v. Shriver, 269 Ill. 161. Nor is the mere fact that in the opinion of others such use would not damage the property of other persons under the same restrictions sufficient. Hartman v. Wells, 257 Ill. 167; Van Sant v. Rose, 260 Ill. 401. Neither does a zoning ordinance repeal such restrictions placed prior to its enactment. Dolan v. Brown, 338 Ill. 412; Gordon v. Caldwell, 235 Ill. App. 170. The finding of the master in this regard was not justified.

The master was of the opinion (as defendants contend) that complainants are not entitled to relief because they are in court with unclean hands. Pomeroy's Equity Jurisprudence, vol. 4, sec. 1702, pages 3972-3974, and Curtis v. Rubin, 244 Ill. 38, with other cases are cited. The contention in substance is that a number of plaintiffs have violated one of the restrictions imposed by building onto their homes sun parlors which extend beyond the building line and which is in disregard of one of the restrictions. The restrictions make an exception of "bay windows" and evidence was offered tending to show that the "sun parlors" erected should properly be thus classified. The term "sun parlor" does not seem to have come into general use at the

time these restrictions were created. We think the sun parlors are not bay windows. Brandenburg v. Lager, 279 Ill. 314; Brandenburg v. The Country Club Bldg. Corporation, 332 Ill. 136. It may be conceded that these structures constitute a technical violation of one of the restrictions, but this is not a bill to restrain the erection of sun parlors beyond the building line. Plaintiffs seek to enjoin the erection of sign boards covering practically the area of two of the lots. Plaintiffs, by erecting sun parlors beyond the building line and thus violating in part one of the restrictions, are not estopped to object to the erection of sign boards covering the whole area of defendants' lots. The business of erecting sign boards for advertising purposes as well as the erection of sun parlors has developed since these restrictions were created, as may be seen by an examination of General Outdoor Advertising Co. v. Department of Public Works, 289 Mass. 149. This theory of estoppel was also urged in the Cuneo case, and upon evidence substantially the same as that upon which defendants here rely, the court said:

"Though it be conceded that the building line restriction has in this particular been violated by some of the lot owners on Castlewood Terrace, there is no evidence of the breach of any other of these several restrictions. Abandonment or acquiescence in the violation of one restriction does not amount to the abandonment of other separate and distinct restrictions material and beneficial to the owners of lots affected by them. Oliver v. Williams, 221 Mich. 471, 191 N. W. 34; Evertsen v. Gerstenberg, supra; Ferry on Rest. on Real Prop., sec. 375."

We hold this defense cannot prevail.

The controlling question in the case seems to turn upon defendants' contention that these restrictions do not (properly interpreted) prohibit the erection of these sign boards. It is admitted that this contention was not made or considered in the Cuneo case. Defendants say, citing many cases so holding, that restrictions of this sort must be strictly construed; that all doubts are to be resolved in favor of the free use of real estate.

They then point out that restrictions Nos. 2, 3 and 4 relate only to buildings, while Nos. 5, 6 and 7 relate to either buildings or structures; that No. 2 is a general restriction relating to buildings and providing that none of them (with the exceptions named) shall be erected beyond the 25 foot building line. Defendants undertake to distinguish between structures and buildings. They say that all buildings are structures but that all structures are not buildings, and cite Bruen v. The People, 206 Ill. 417. They say that a building (unlike a mere structure) must be permanent in its nature and designed for the habitation of men or animals or for the shelter of property. Having by this distinction eliminated restrictions Nos. 2, 3 and 4 as applicable to sign boards, they say that No. 5, properly construed, merely limits structures or buildings from use by more than one family, thus also eliminating this restriction in so far as sign boards are concerned. Nos. 6 and 7, it is said, are substantially the same in providing that no building or structure shall be built, adapted, used or maintained for a livery stable or for "conducting any kind of business." Defendants then cite Webster's New International Dictionary and Words and Phrases, second series, vols. 1 and 2, as to the meaning of the words "conduct" and "business." They also cite Fletcher Cyc. Corp., vol. 17, secs. 8498 and 8465, to the effect that soliciting subscriptions or advertisements is not doing business. These sections have reference to situations where the question for decision was whether a foreign corporation was doing business within the meaning of a state statute requiring a license so to do. Krakowski v. White Sulphur Springs, 161 N.Y.S. 193, which is also cited and relied on, is a case where a similar question was considered. These authorities give little assistance in the determination of the controlling question here, which is, What was the intention of the

parties at the time the restrictions were created as disclosed by the language used? From this standpoint it is quite apparent that those originally agreeing to the restrictions did not have in mind any technical distinction between a structure and a building, nor between conducting an advertising business and other kinds of commercial pursuits. The evident intention, as disclosed by all the restrictions, was to protect these particular premises from every use which would tend to destroy the value of homes to be erected on the premises. It is apparent that the real intention was to preserve Castlewood Terrace perpetually as a residence street, and every interpretation of the restrictions must keep this controlling purpose in view. The Century Dictionary defines a building as -

"Anything erected by art, and fixed upon or in the soil, composed of different pieces connected together, and designed for permanent use in the position in which it is so fixed, is a building. Thus, a pole fixed in the earth is not a building, but a fence or wall is."

It is apparent that a sign board may be a building within the meaning of this definition when considered with reference to the purpose of these restrictions, and it has been expressly so held by the Appellate court of the Second district in Woodburn v. Russell, 213 Ill. App. 553, in a well reasoned opinion. The same construction has been put upon this word in other jurisdictions as applied under analogous circumstances. Mecca Realty Co. v. Kellogg Toasted Corn Flakes Co., 148 N. Y. Supp. 1040; Swasey v. County of Shasta, 141 Cal. 392 (74 Pac. 1031); Pocock v. Gilham, 1 Cal. and Ellis 104; Russey v. Provincial Bill Posting Co., 25 Times Law Report, 489, 1 Chancery Div. 1909, 734. The evidence shows that one of the proposed sign boards is to cost \$418 and the other one \$796. We hold that the proposed sign boards are within the meaning of the restrictions, and that the erection and proposed use of them would constitute a violation of the provisions of the restrictions, particularly

numbers 3, 6, and 7.

For the reasons indicated the decree of the Circuit court is reversed and the cause is remanded with directions to sustain the exceptions to the report of the master and to issue a permanent injunction as prayed.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor and McSurely, JJ., concur.

39149

ROBERT A. MORREY,
(Plaintiff) Appellant,

vs.

FREDERICK H. BARTLETT, Individually
and FREDERICK H. BARLETT as Trustee
for and doing business as FREDERICK
H. BARTLETT REALTY CO.,
(Defendant) Appellee.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

288 I.A. 620¹

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This appeal is by plaintiff from a judgment for the defendant entered upon the finding of the court. The suit was for the return of money said to have been paid by plaintiff to defendant under the terms of a written contract, by which defendant agreed to sell and plaintiff to buy certain real estate, and for damages sustained by reason of the alleged unlawful forfeiture of this contract. The contract was made August 4, 1932, was in writing, and by its terms defendant (upon conditions named in the contract) agreed to convey to plaintiff two lots in a subdivision in Waukegan, Lake county, Illinois. The lots constituted the northeast corner of Rockland and Telegraph Roads. The premises are improved by an oil station and a small restaurant, and occupied by a tenant named Klein.

The purchase price was stated to be \$37,500; \$300 in cash, the receipt whereof was acknowledged; \$16,100 by "special allowance"; and plaintiff agreed to pay the balance of \$21,100 in monthly installments of \$50 each or more on the 16th day of each and every month thereafter, commencing September 16, 1932, and to continue for six months; \$100 or more on March 16, 1933, and the same amount on the same day of each month thereafter for six months; thereafter, beginning September 16, 1933, \$150 a month until 45 months from the date of the contract, at which time the

entire unpaid balance of the purchase price would become due. All of these payments were to be made with interest at the rate of 6% per annum, payable monthly on the whole sum from time to time remaining unpaid, with interest at 6% on all delinquent payments. Plaintiff also agreed to pay all taxes and special assessments levied for improvements not completed on May 1, 1926. The contract provided:

"In case of the failure of the said purchaser to make any of the payments, or any part thereof, or perform any of the covenants on purchaser's part hereby made and entered into, or to keep and observe all the conditions, covenants and restrictions herein above set forth, this contract shall, at the option of the vendor, be forfeited and determined, without notice, whether time of payment has been extended or not, provided purchaser shall be in default as to such extension, if any, at the time of vendor's exercise of said option, and the purchaser shall forfeit all payments made on this contract, and such payments shall, without notice or demand of any kind, be retained by the said vendor as voluntary payments made on account of purchase price in full satisfaction and in liquidation of all damages by him sustained."

Time was made of the essence of the contract.

Prior to the execution of this contract on August 4, 1932, defendant was under contract to convey these premises to Fred A. Boswell; that contract, however, was (on the day this contract was made) cancelled and surrendered to defendant. The contract of August 4th was executed at defendant's office in Chicago in the presence of Boswell and his wife and the plaintiff. John Henry, an employee, handed the contract to plaintiff for execution. Boswell says he told Henry that he was about to sell his rights in the land to plaintiff and asked that the amount which had been paid in by him on his contract be credited on the new contract with plaintiff. He says that Henry said the arrangement could be made, and that Boswell at that time delivered a quitclaim deed for the premises to Bartlett. The evidence, however, indicates that Henry was not authorized to make any such agreement. The written contract, which is presumed to contain the entire agreement of the parties, does not contain any such provision, and the

fact that defendant insisted on the cancellation and delivery to it of the contract with Boswell negatives any intention of the parties to make any such agreement.

There is no proof in the record as to the actual amount of money paid by Boswell to defendant under the prior contract, or that other consideration was given by which the amount of the special allowance was determined. Boswell thereafter acted as the agent and representative of plaintiff in making payments, and the evidence indicates that Boswell was in fact the real party in interest in the new as well as under the old contract. In addition to the payment of \$300 made August 4, 1932, payments of \$50 each were made under the contract on September 24, October 19, November 17, December 17, 1932, and payments of the same amount on March 18 and April 17, 1933. There was a further payment of \$100 on May 16, 1933, and payments of \$50 each on July 26, September 28, and November 17, 1933. A further payment of \$100 was made on December 12, 1933. Taxes for the year 1932-33 amounting to \$397.14 accrued, which plaintiff was obligated under his contract to pay, but on which only \$100 was paid, leaving a balance unpaid of \$297.14. March 1, 1934, payments, under the terms of the contract, were due and unpaid to the total amount of \$1250, with interest at 6% on the balance due on the contract, and March 16, 1934, the further sum of \$150 fell due, which was unpaid. The plaintiff concedes that on March 1, 1934, \$1547.14 with interest was due and unpaid, and that on March 16, 1934, \$1697.14 with interest was due and unpaid under the terms of the contract.

During this time W. B. Ames was the office manager of defendant, and the collection of the amount due under this contract was under his direction. The matter was at first handled by the collection department without his direct intervention, but later in 1933 the fact that plaintiff was delinquent in his payments was

called to his attention; he called in Boswell, who represented plaintiff, and told him the full amount should be paid, which Boswell said he would endeavor to do at an early date. Boswell did not come in and was again notified; he then came in and told Ames he had not been able to raise the money but thought he was going to be able to get it; Ames told him he would be allowed a few more days. Boswell said he would attempt to get \$500 and bring it in to pay up the account. This was in the early part of December. Later in that month Boswell brought in \$100 and asked to have it applied on the principal of his contract; Ames told him there was more than \$100 due on the taxes and much more than \$100 due on the principal, and that he could not accept \$100 and apply it on the principal, but would apply it on his sundries and tax account. Boswell insisted that the \$100 be applied upon the principal and Ames told him it was impossible, and the \$100 was received and applied on the sundries account. Boswell again agreed that he would endeavor to get additional money to the amount of \$500 to apply on the principal. Boswell did not come in until after the first of January, 1934, at which time he brought \$100, saying it was all he had been able to raise, and that he wanted it applied on his account; Ames told him it was impossible to apply \$100 on his account because his delinquency was so great that he could not accept it; he also told Boswell at that time that the payments were \$150 for each month, and he could not accept \$100. Ames refused to accept the \$100 tendered. Boswell was to come in again, which he did not do, and Ames sent for him; he came in February 19, 1934, but did not bring or tender any money. Ames asked Boswell if he had been able to get the money; he replied he had not but thought he could. Ames then asked him if he would assign the amount of money he was receiving from

from gas sales at the station, but he replied he could not do that, he would not have anything to live on, whereupon Ames said in that case there was no possible chance for a continuance of the contract, and that it would be necessary to serve him with a ten days notice. The cancellation of the contract was discussed and Ames suggested that he go in to see Mr. Keneval, general sales manager, who was Ames' superior; they went in, where the facts heretofore recited were related to Mr. Keneval, and Boswell was told that it would be necessary on that day to serve notice of intention to forfeit. Keneval asked Boswell if he could not get the money; Boswell said he had not been able to and gave some of the reasons; Keneval again asked him if he would not give defendant the gasoline money or assign it; Boswell said he could not; Keneval then told Ames to proceed with the forfeiture. Ames recalls, however, that Keneval did at that time say to Boswell, "We will do this for you. We will not sell the property for thirty days," and Ames says that when Boswell was leaving Keneval said, "I will hold this property off the market for thirty days. If you are able and it is all right with Mr. Ames, I will be glad to readjust this contract within that period." At that time, February 19, 1934, the defaults under plaintiff's contract aggregated \$1547.14. On the same day, February 19th, Ames caused to be prepared a letter directed "To Whom It May Concern." It stated that defendant had taken possession of the lots (describing them) by cancellation of the contract, and notified that payments for rent should not be made except at Bartlett's office; that Mr. Byl, who was then district manager for defendant in that territory, would serve the notice and make arrangements for the further handling of the property. This notice was mailed to Byl who served it on Klein, the tenant in possession of the premises on March 4, 1934. On the same day Byl also served a

notice on Adolph Kucera, manager for that district of the Shell Corporation from whom Klein was buying gas. The service on Kucera was on March 4, 1934, at Waukegan.

March 2, 1934, defendant caused to be mailed to plaintiff a "Vendor's Declaration of Forfeiture and Determination of Contract," addressed to plaintiff at his Chicago address, reciting the execution of the contract on August 4, 1932, the provisions thereof with reference to forfeiture, defaults of the purchaser with reference thereto, and declared that on account of such default defendant had elected to and did forfeit and determine the contract and all rights and interest of the purchaser, his heirs, representatives, successors and assigns. The declaration stated that defendant thereby forfeited and retained all payments made by the purchaser as liquidated damages, as provided in the contract. As a matter of fact defendant did not after the forfeiture take physical possession of the property, but permitted Klein, who had been plaintiff's tenant, to continue in possession.

The evidence shows that during the entire time plaintiff had his contract with defendant he paid, under the contract, a total of \$950, \$100 of which was in part to reimburse defendant for tax advancements defendant had made to the amount of \$397.14. From December, 1932, four months after the date of the contract, up to the end of February, 1934, the Shell Petroleum Corporation paid to plaintiff and to Boswell, as plaintiff's agent, rent for the property aggregating \$1481.71. During the same period plaintiff paid to defendant only \$400 on the purchase price and the \$100 to reimburse defendant for tax advancements. During the period that plaintiff was in possession under the contract he made no improvements whatsoever upon the premises. Defendant kept the property off the market for over 30 days after the conference of February 19, 1934, and neither after that conference nor after the

service of the notice of intention to forfeit and determine the contract, nor after the service of the Vendor's Declaration of Forfeiture and Determination of the Contract did plaintiff, or anyone on his behalf, communicate with defendant or offer to meet the defaults under the contract or request any additional time in which to cure the defaults.

Some time after the end of this 30 days, defendant sold the property to Klein for \$10,000. There is evidence tending to show that this was the full value of the property on February 19, 1934, and March 2, 1934. It is undisputed that at the time of the alleged forfeiture of the contract there was due to defendant thereunder the sum of \$20,550, and the further sum of \$297.14 advanced by defendant for taxes. June 25, 1934, the attorney for plaintiff addressed a letter to defendant advising him that plaintiff would ignore the forfeiture and would hold defendant responsible for all loss and damage.

Plaintiff presents many points with citation of authorities, but only a few points are argued in his brief. His contention is in substance that the provisions of the contract to the effect that time was of its essence had been waived by defendant through its conduct in accepting payments from plaintiff after the same had become due according to the strict terms of the agreement; that, therefore, defendant would not be permitted to suddenly insist upon a forfeiture of the contract, but before availing himself of the time clause defendant was by law required to give reasonable, definite and specific notice of his changed intention and determination to enforce the strict terms of the agreement. The law to that effect is well settled as illustrated by Watson v. White, 152 Ill. 364; Strey v. Buehl, 265 Ill. App. 554; Craft v. Calmeyer, 274 Ill. App. 296, and Plummer v. Worthington, 321 Ill. 457. We hold the rule is not applicable here for the reason that the

undisputed evidence shows that defendant did not at any time waive the time provision of the contract. On the contrary the evidence indicates that defendant, through its collection department and later by special reference of the matter to the office manager, Ames, at all times insisted that plaintiff should with all promptness comply with the terms of the contract as to time of payment. Repeated demands were made upon Boswell, who represented plaintiff in the transaction, that plaintiff comply with the terms of the contract in this regard.

More than a month prior to the notice of forfeiture defendant actually refused the tender of a partial payment of the amount due. Repeated promises were made by plaintiff which he repeatedly failed to keep. This is not a case where a vendee has been lulled into a sense of security and then suddenly required to make payment promptly with a view on the part of the vendor of depriving the vendee of his property. We do not think it necessary to analyze the cases. They are clearly inapplicable to a situation such as is disclosed by the evidence. Defendant calls attention to the fact that the contract expressly provided that the acceptance by the vendor, once or repeatedly, of payments made after they became due, should not operate as a waiver of the provision of the contract that time was of the essence of it. It was indicated in Brown v. Chowchilla Land Co., 59 Cal. App. 154, 210 Pac. 424, that such a provision might be held valid. It may well be doubted whether the Illinois courts would so hold. The courts of this state have, however, held that the acceptance by a vendor under such a contract of partial payments made a few days after the maturity thereof, according to the terms of the contract, is not sufficient to constitute a waiver or form the basis of an estoppel. Ferguson v. Steiner, 203 Ill. App. 227; McKinney v. Charles Mulvey Mfg. Co., 157 Ill. App. 339. It is undoubtedly the

law that if the parties to such an agreement mutually waive a provision therein that time is of the essence of the contract, one of the parties will not be permitted to suddenly and unfairly insist upon a forfeiture.

Forfeitures are not favored by the courts. This is because of the harsh and often inequitable results of such enforcement. This is the reason for the rule. There has been no conduct here producing inequitable results. The evidence shows that during the time the contract was in force plaintiff received from the rentals of the premises purchased the sum of \$1481.71; he paid on the principal obligation under the contract \$850 and expended \$100 in partial discharge of the obligation assumed under the contract to pay the taxes on the premises. He paid out under the contract the total sum of \$950, leaving him with a net profit on the transaction of \$531.71. His original investment was \$300, almost one-third of the total payments made. In view of his delinquency defendant asked him to assign the income of the premises as security for his obligation under the contract; he declined, saying that he needed it for his living expenses.

The trial court summed up the reason for its finding, saying:

"Morrey is suing for whatever he is entitled to recover from the Bartlett Real Estate Company. Morrey evidently is a kind of figurehead or something. He came into the picture and so far as the record goes, he hasn't got a dime invested in this thing. He is the new vendee from Bartlett and he got credit for all that had been paid upon a real estate contract which was made with one, or two or three or four parties, which is immaterial. The sum of fifteen or sixteen thousand dollars has been paid by various vendees upon that contract. Now Morrey comes into the picture and he says: 'I will take it over,' and Bartlett's system of generosity---they said, 'We will give you credit for ten thousand upon this--- upon the contract', which is largely fiction. Morrey goes along and collects \$1400 or more out of the proceeds of the place and he pays in \$800. In other words, he gets \$600 net without investing a dime and now he gets out from under paying \$1400 which he is in arrears on the contract to buy a \$10,000 piece of property. Then you come in here insisting Morrey is entitled to

recover. I can't see it at all. There will be a finding for the defendant."

This case is entirely different from Strey v. Buehl, 265 Ill. App. 554, Craft v. Calmeyer, 274 Ill. App. 296, and other cases upon which plaintiff relies.

The judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

39158

SIGNE MOUSTIS,
 (Plaintiff) Appellee,

vs.

JAMES MOUSTIS,
 (Defendant) Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

288 I.A. 620²

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant husband, who was also a cross-complainant, from a decree which, dismissing his cross-bill, granted to the plaintiff wife a divorce on her bill, gave to her the custody of their three children, directed that defendant pay \$20 a month alimony for their support, and referred the cause to a Master in Chancery to report concerning the property rights of the parties.

The bill was filed April 10, 1935. It averred jurisdictional facts as to residences; the marriage of the parties, which took place January 29, 1919; the birth of three children, George 12, William 10 and Esther 9 years of age; that they had lived together as husband and wife until July 15, 1933.

The bill as amended charged that defendant was guilty of habitual drunkenness, of adultery, continuous inhuman treatment, failure to properly support, and specifically charged that he was guilty of extreme and repeated cruelty in that he had twice assaulted her - in April, 1932, with a gun, and on October 31, 1934, with a knife. The specific allegation as to the occurrence in April, 1932, was not set up in the original bill but was presented by way of amendment to it. Other averments of the bill concerned the rights of the parties in property held by defendant. The bill prayed for divorce, custody of the children, alimony and a settlement of these property rights.

Defendant answered denying all misconduct as alleged and filed a cross-bill charging plaintiff with desertion on July 15, 1933. She answered, denying the desertion. The cause was put at issue and heard by the chancellor in open court. The chancellor found the issues for plaintiff and entered a decree as heretofore recited.

Defendant says that the only question on the appeal is, "Is the evidence sufficient to warrant the finding of cruelty and entering a decree of divorce thereon?" With this statement we agree. The only finding of guilty was with reference to the charge of cruelty. The other charges, in the opinion of the chancellor, were not sustained. The charge of the assault in April, 1932, was corroborated by a witness. The testimony of plaintiff as to the latter assault was not corroborated by any occurrence witness. Plaintiff lived with defendant after the first alleged assault and thereby condoned it. If, however, the second assault occurred, this would revive the forgiven charge. Plaintiff was not corroborated as to the second charge, and therefore it is entirely correct to say that the merit of plaintiff's case depends upon the proof of the second assault.

Defendant insists that a decree for divorce for cruelty cannot be sustained on the testimony of one of the parties to the suit where the act of cruelty is denied by the other, and there is no corroboration of plaintiff's charges. Defendant cites a number of cases but relies upon Moore v. Moore, 362 Ill. 177. The rule for which defendant contends is not supported by the opinion in that case. It is a rule of statutory construction interpreting section 8 of the Divorce statute. (See Ill. State Bar Stats., 1935, chap. 40, page 1273.) That section in substance provides that if the complaint is taken as confessed, the court shall proceed to hear the cause by examination of witnesses in open

court, and that "in no case of default shall the court grant a divorce unless the judge is satisfied that all proper means have been taken to notify the defendant of the pendency of the suit, and that the cause of divorce has been fully proven by reliable witnesses." It is apparent that section of the statute was intended to safeguard the rights of the parties and the public in cases where default was entered and has no application to cases where a trial is had after issues joined and the parties appear and testify. It has been so held in a number of cases: St. Louis & O'Fallon R. Co. v. Union Tr. & Sav. Bank, 209 Ill. 457; Doose v. Doose, 300 Ill. 134. The Moore case when carefully read does not hold to the contrary or support defendant's contention.

The parties conducted a restaurant and lived in rooms above it. With reference to the first occurrence, plaintiff testified that on a particular morning in the first part of April, 1932, she did not go to help defendant in the restaurant; that he came up stairs and started arguing and said, "If you don't like it you know what you can do;" that one word led to another; that defendant had a blue steel gun; that he shuffled along, and that plaintiff got back of a leather chair in the living room; he said, 'Now you know----' such language---you could not use that language in court. I screamed, I got frightened. This woman (who had come in to do my housework) stepped in when I began to scream. She saw me behind the chair and heard his words, 'I will blow'--- I don't use that profane language." The witness further says that Catherine Brucks was the woman who was present on that occasion.

Catherine Brucks testified that she washed dishes, and that at the end of March or April, 1932, when she began to work at defendant's restaurant, she went up a flight of stairs leading to the parlor and bedrooms, and saw Mrs. Moustis working; that one day

she saw defendant and Mrs. Moustis up there; that defendant had a steel gun; that when she stepped in he said, "What the hell do you want? Get the hell out of here or I will shoot your brains out." She says that Mrs. Moustis looked scared; that defendant had a gun at her head and said, "I will blow your brains out." She then went out, and that was all witness saw. Then plaintiff came down stairs and worked in the restaurant. This was in the spring of 1932, and she continued to work there at the request of the plaintiff for two years. On cross-examination she said that this assault occurred on Saturday about nine o'clock in the morning when she started to work; that plaintiff was sitting in a chair; that defendant had a gun up to her head and said he would shoot her brains out. Thereafter defendant had some trouble with the witness and ordered her out of the restaurant, saying, "Get out of here. You don't have to have a stool pigeon around here."

The record of the 1934 occurrence (as presented in plaintiff's Additional Abstract) is as follows:

"Q. In 1934, where was this, the time that he took a knife to you, where were you? A. I came home to work.

Q. Where were you standing when he threatened you?

A. I came right in here. Here is the door. I came in and he was standing before the table, carving meat, and I backed up into the dining room.

Q. Why were you working there? A. I worked in the restaurant because he did not take care of the business.

Q. That was why you were standing there with him?

A. Yes, I had to help in the kitchen.

Q. That was the only occasion he was cruel to you, in October, 1934, when you say he took a knife to you? A. I don't understand your question.

Q. At that time (in October, 1934) what else did he say to you when you said you screamed--- did he say anything?

A. He said he would cut my guts out of me with the knife."

Plaintiff's story of this occurrence is not corroborated and is denied by defendant.

Defendant contends that this evidence is wholly insufficient to establish extreme and repeated cruelty. Numerous cases are cited by the parties, many of which it will be unnecessary to consider in

detail. In Whitlock v. Whitlock, 268 Ill. 218, the husband sued for divorce on the ground of adultery. Defendant filed an answer denying the charge, and filed a cross-bill charging him with extreme and repeated cruelty. The trial court heard the evidence, found the wife guilty, dismissed her cross-bill and granted the husband a divorce. The Supreme court, reviewing the case, held the evidence not sufficient to prove adultery. It also held that the charge of extreme and repeated cruelty was not sustained, reversed the decree and remanded the cause. The opinion stated (p. 227):

"To justify a divorce on the ground of extreme and repeated cruelty, the cruel treatment proved must be actual violence and it must be repeated. What would amount to extreme and repeated cruelty depends largely upon the facts and circumstances of each particular case. (Ward v. Ward, 103 Ill. 477.) There is some corroboration as to one of the alleged acts, but the evidence, for the most part, is entirely that of the defendant, and the complainant denied her charges. There should be evidence of such acts as would constitute sufficient cause for divorce under the circumstances besides the evidence of the party to the suit who makes such charges, where such acts are denied."

In Trenchard v. Trenchard, 245 Ill. 313, the wife sued, charging extreme and repeated cruelty, and upon a hearing was granted a decree which was affirmed by the Appellate court. Upon writ of error to the Supreme court the decree was reversed, the court saying (p. 314):

"We are of the opinion the bill does not state a case of extreme and repeated cruelty within the meaning of our statute. What is meant by cruelty, as used in our statute, has been the subject of consideration by this court in many cases, and has been construed to mean physical acts of violence; bodily harm, such as endangers life or limb; such acts as raise a reasonable apprehension of bodily harm and show a state of personal danger incompatible with the marriage state. Bad temper, petulance of manner, rude language, want of civil attentions or angry or abusive words are not sufficient grounds for divorce for extreme and repeated cruelty. (Henderson v. Henderson, 88 Ill. 248; Harman v. Harman, 16 id. 85; Embree v. Embree, 53 id. 394; Vignos v. Vignos, 15 id. 186; Turbitt v. Turbitt, 21 id. 438; Maddox v. Maddox, 139 id. 152; Fizette v. Fizette, 146 id. 328."

In Moore v. Moore, 362 Ill. 177, the plaintiff wife, in support of her charge of extreme and repeated cruelty, testified that the defendant attempted to take a letter from her and shoved

her around so that she was injured; that on another occasion she was going through his clothing looking for her watch which she suspected he had taken, when he jumped out of bed and grabbed her. On yet another occasion, when she was engaged in an altercation with her sixteen year old son who pushed her down and swore at her, and she hit him with a hairbrush, the husband seized her and twisted her arms. Numerous persons acquainted with the family testified that while the parties fussed a great deal, the husband was upon the whole a good provider and a good husband. He furnished her with an automobile and paid her doctor bills; he seemed to be able to make the children obey, which she was unable to do. The court said (p. 179):

"Cruelty constituting ground for divorce under our statute means physical acts of violence, bodily harm or suffering, or such acts as endanger life or limb or such as raise a reasonable apprehension of great bodily harm. Bad temper, petulance, rude language, want of civil attentions, angry and abusive words, do not constitute extreme and repeated cruelty within the statute. Trenchard v. Trenchard, 245 Ill. 313; Maddox v. Maddox, 189 id. 152; Henderson v. Henderson, 88 id. 248."

A further extended examination of authorities would not aid our decision in this case. Each case must be considered as an individual matter. We have carefully gone over this record, keeping in mind the interest of this family as a whole as well as the relationship of these parties to each other. They were married January 29, 1919. They lived together until July 15, 1933, more than fourteen years, and they had been acquainted with each other several years before they married. She appears to have been by birth Danish, he a Greek; he operated a restaurant; she was a waitress and a cook. Both seemed to be industrious, thrifty and very much interested in the business. They tried to settle their marital differences by contract, which is in evidence, on January 24, 1935. The contract does not indicate for whose fault they decided to separate, but recites that differences had arisen between them, and that it had become impossible for them to live

together as husband and wife. The contract provides that the husband shall have the exclusive right to the first floor of the building in which the Ashland avenue restaurant was conducted; that he shall furnish the necessary food for the wife and their children; that she shall devote her time exclusively to the three children and give them motherly care; that he shall pay her \$5 a week on each Monday, "to spend as she pleases"; that she will not interfere with his running of either of the restaurants. She is to permit the elder son to go to Greece with his aunt and stay for two years at the expense of her husband. She is to have the automobile two days a week, every other Sunday, every other Monday, and every Thursday.

The husband testifies and she does not deny that on April 20, 1933, when he, upon returning from a trip to Michigan, visited her; she said to him, "Jim, I don't love you any more; we better split up." I said, 'There are three kids; don't you feel sorry for the three little kids?' and she said, 'No'. There was no reason for discussion. She gave me no reason. She said something about nationality, and I said, 'We have lived together seventeen years and have been going together for twenty and if you have something against me, all right, but nationality ought to have nothing to do with it.' I went down to the restaurant and stayed at night. I went upstairs but there was no chance she would stay with me. I pleaded with her but she said no. I went upstairs to sleep and when I was asleep she went away and stayed six weeks and there were the three kids left with me. I found she was with a Mrs. Burns and I told the kids to go and beg her to come back. She came and stayed downstairs. I tried to get her to see after the children but nothing doing. She promised to be good and take care of the children but she did not show up."

Defendant denies that he ever threatened plaintiff with either a knife or a gun, and reading the whole record we are persuaded that in this respect he states the truth. They quarreled a great deal; he used rough language toward her; she gave it back to him in kind, and she admits that she has ability in that direction. She has lived with him and near him for almost twenty years, and it does not appear that she had ever suffered actual physical harm. It may be that a separation is inevitable. The interest of this family should be controlling. Some of the children are now of an age when, in view of the seriousness of the situation, their evidence should be taken. As the record stands, the decree entered is against the preponderance of the evidence, and it will be reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

39026

In the Matter of the Estate of
LOUIS B. COHEN, Deceased,

Petition of BERNARD COHEN for
a Citation to Discover Assets,
Appellee,

vs.

SARA COHEN,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

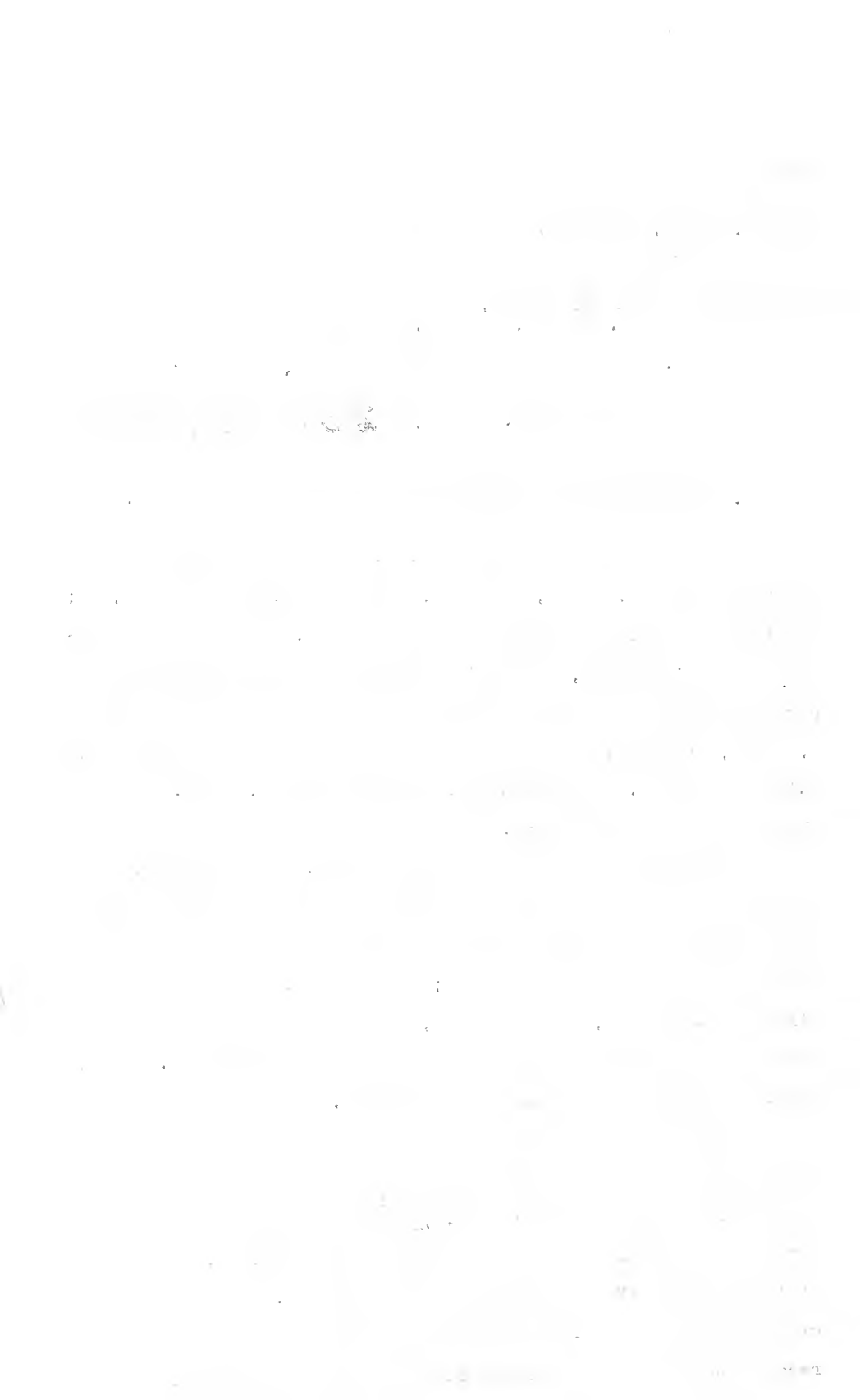
288 I.A. 620³

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Bernard Cohen filed his claim in the Probate court in the estate of Louis B. Cohen, deceased, which was allowed for \$62,500; he filed a petition asserting that Sara Cohen, both as administratrix and individually, and Louis Goldman had in their possession certain certificates of stock belonging to the estate of Louis B. Cohen, deceased, and asked that a citation issue against them; this was allowed. Respondent Sara Cohen answered, denying the allegations of the petition.

The certificates of stock in question represented 748 shares of the capital stock of Cohen Brothers Furniture Company, an Illinois corporation; the Probate court found that this stock belonged to Sara Cohen personally; the claimant appealed to the Circuit court where, after hearing, it was held that these certificates of stock were the property of the estate of Louis B. Cohen, and Sara Cohen alone appeals to this court.

Her brief in this court is for the most part devoted to a discussion of alleged errors of the trial court in admitting the testimony of certain witnesses, ^{the} point being that they were permitted to testify as to statements made by Louis B. Cohen out of the presence of Sara Cohen and Louis Goldman. Counsel for the claimant says that while objections were suggested by counsel, the record shows that the court admitted the evidence subject to the



objections but made no ruling on these objections, nor was any request made by opposing counsel for such ruling nor any motion made to strike any testimony. In Mitchell v. Chicago, B. & Q. Ry. Co., 265 Ill. 300, it was held that where the ruling on objections was reserved and no ruling afterward made, "no ruling of court on the admission of evidence can be considered." Moreover, the statements by Louis L. Cohen were with reference to the stock in the Furniture company at a time when he was the undisputed owner and neither Sara Cohen nor Louis Goldman had or claimed to have any interest in the stock. This testimony is competent, and the only question before us is whether the competent evidence sustains the finding.

Jacob Cohen and his brother, Louis B. Cohen, were the two principal stockholders of the Cohen Brothers Furniture Company; Louis Cohen had invested in real estate, executing many second mortgages; the evidence shows that he was apprehensive that the holders of these mortgages might resort to his personal property for collection, and he wished to make some transfer of his stock in the Furniture company so as to put it beyond the reach of possible creditors; after several discussions with his attorney and his brother, Louis Cohen in 1930 transferred his stock to his wife's brother, Louis Goldman, and new certificates of stock were re-issued in Goldman's name; these certificates were not delivered to Goldman but were kept by Louis Cohen in his safety deposit box in the Greenebaum bank. The attorney for the company testified that Louis Cohen never owed Goldman any money; that there was no consideration for the transfer of the stock to Goldman.

Louis Cohen began to fail in health and differences arose between him and his wife Sara, who in October, 1931, filed a suit in the Circuit court asking for separate maintenance; thereupon Louis Cohen attempted to transfer back to his own name the stock

appearing in the name of his brother-in-law, Louis Goldman.

Sara Cohen testified that Louis, her husband, about two years prior to his death in April, 1933, visited Rochester, Minnesota, with reference to his physical condition; that before he left for Rochester he took her to the deposit box at the Greenebaum bank and arranged for her to have access to it; that subsequently, sometime in 1932, she went to the deposit box, took out the documents and papers and put them in another deposit box in the same bank in her own name; that later she took these papers to the Madison and Kedzie State bank and there took a box in her own first name and her mother's maiden name - Sara Figlartz. Louis did not know that his wife had taken these papers.

It was shown that in the hearing in the separate maintenance proceeding Sara Cohen testified that she took the stock certificates from the Greenebaum safety deposit box and gave them to her brother, Louis Goldman, when her husband, Louis Cohen, was in Rochester for medical treatment.

The attorney for the Furniture Company testified that in July, 1933, after Louis B. Cohen's death, Goldman inquired as to why Sara was not allowed to participate in the business, to which the attorney inquired as to whether he, Goldman, or Sara, owned the stock, as each claimed it, and that Goldman replied in substance he was holding it "just to protect Louis," and that the stock belonged to Louis' wife and children by reason of his death.

Malcolm McKerchar testified under subpoena that he was a lawyer and the attorney for Sara Cohen in her separate maintenance suit against Louis B. Cohen; that Louis Goldman and Sara Cohen were in his office in May or June, 1932, and he was shown the certificates of stock in question; that he stated to them that he understood that these were the shares belonging to Louis B. Cohen which

Mrs. Cohen had taken out of the box and turned over to Goldman for the protection of Louis Cohen "in the event that anything goes wrong," and that Goldman replied, "Yes, that is true, I have nothing to do with it myself, and I would like to get them out of my hands into a trust company where I will not be involved in a family suit."

Louis Goldman testified, but he was vague and had no recollection of a number of relevant matters. He testified he had filed a voluntary petition in bankruptcy but did not schedule the stock in question as an asset; he did not know how long his sister Sara had had possession of the certificates and could not recollect whether he had ever had possession of them, although he later said that he turned these certificates over to his sister in July, 1932, but said, "I had no interest in them."

Sara Cohen on October 13, 1931, about a year and a half after the purported transfer of the stock to Louis Goldman, filed a bill of complaint seeking separate maintenance from her husband Louis, in which she alleged under oath that Louis B. Cohen owned a half interest in the Cohen Brothers Furniture Company; she asked that her husband be enjoined from disposing of any of his property; the master to whom the case was referred reported that he found that Louis B. Cohen was the owner of one-half interest in the Cohen Brothers Furniture Company.

No theory is suggested, nor does the record present any, upon which it could be held that Sara Cohen owned the stock; the certificates were never in her name and were never delivered to her. Goodman might make the semblance of a claim, but he disavows any interest in the stock and has not followed this appeal.

It is suggested that the record fails to show that there were unsecured creditors of Louis B. Cohen, the deceased, at the time of the alleged transfer to Goldman, and no evidence that

anyone was defrauded, and therefore there were no creditors whose claims Louis Cohen had any reason to fear at the time of the transfer. This is not material. The point is that Louis Cohen transferred his stock to Goldman because of apprehension of possible creditors and that this transfer was without consideration and fictitious.

The evidence before the trial court, who saw the witnesses and heard them testify, amply sustains its conclusion, and the order of the Circuit Court is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

39061

JOHN JACOBSON,
Appellee and Cross-Appellant,

vs.

HERBERT F. PHILIPSBORN and R. C.
PHILIPSBORN, doing business as H. F.
PHILIPSBORN & CO., and OTOE CORPORA-
TION, a Corporation,
Appellants.

APPEAL FROM SUPERIOR

COURT OF COOK COUNTY.

288 I.A. 620⁴

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his bill seeking an accounting, with special reference to \$2270 deposited by him with H. F. Philipsborn & Co., alleging that \$800 of this amount had been wrongfully paid by this company for the use and benefit of the Otoe Corporation, hereafter called defendant. Plaintiff also claimed that the balance of \$1470 in the hands of Philipsborn belonged to and should be paid to him.

In an amended bill plaintiff, having acquired the notes and trust deed later mentioned, sought a partial foreclosure by reason of the alleged default by defendant in the payment of a principal note for \$500 and interest. Answers were filed, a reference made to a master in chancery and a decree entered based upon his report, finding that of \$1470 deposited by Jacobson with Philipsborn \$50 be retained by Philipsborn for attorney's fees and the balance of \$1420 be paid to Jacobson; that the \$800 remaining be prorated between plaintiff and defendant. Defendant appeals, claiming all the moneys deposited with Philipsborn, and plaintiff has filed a cross appeal claiming all of the \$800.

The controversy grew out of a sale of improved real estate by plaintiff to defendant, and the question is whether certain installments of principal and interest, and also the real estate taxes for 1933 and 1934 should be paid by plaintiff out of the

money deposited by him with Philipsborn, or whether defendant bought subject to all the principal indebtedness with interest and also the tax arrears.

Defendant filed a counterclaim alleging that plaintiff had misrepresented the premises prior to purchase, and a mass of testimony, with many exhibits, was presented on this issue. The decree ordered the counterclaim dismissed, and this is not questioned in this court.

Plaintiff was the owner of the improved real estate in Evanston, Illinois; April 4, 1933, he obtained a \$10,000 loan from H. F. Philipsborn & Co., which indebtedness was evidenced by five principal promissory notes, four of them for \$500 each, the first falling due on October 4, 1934, three on the same day in 1935, 1936 and 1937, respectively, and the last one, for \$8000, falling due in 1938, interest at the rate of 6% per annum payable on April 4 and October 4 of each year. These notes were secured by a deed of trust conveying the real estate to the Chicago Title & Trust Company as trustee.

A construction of clause 12 of the trust deed is one of the important issues in the case. It provides in substance that for the purpose of providing funds for the payment of principal, interest and taxes the party of the first part (Jacobson and wife) agreed, beginning April 4, 1933, and thereafter on the 4th day of each succeeding month, to deposit with Philipsborn & Co. a sum of money equal, in the aggregate to one-twelfth of the amount of the principal payment due on the next principal payment date thereafter, and one-sixth of the amount of interest payable on the next interest payment date thereafter, and also an amount equivalent to one-twelfth of the current year's taxes, estimated upon the basis of the taxes for the preceding year. Clause 12 further recites:

"The intent hereof is that the aggregate deposits made during each year shall place in the hands of the depository a sum sufficient to pay the principal, ** interest due during each year, and the current taxes and special assessments, if any, upon said premises. *** Deposits made in accordance with this Section shall be held for the benefit of, and be paid to, the holder or holders of said notes and interest coupons thereto entitled but shall not constitute payment until paid to the persons entitled thereto and shall not bear interest in the hands of the depository."

Plaintiff made all the deposits as provided for by this clause, and this litigation is concerned with the disposition of the amount deposited.

Plaintiff wished to sell the property and listed it for that purpose with real estate agents, Kroll & Smith; Kroll got in touch with defendant and in the summer of 1934 negotiations took place between Kroll and Mr. Orwig, who represented the defendant; at these conversations the cost of operation and income from the building were discussed; Orwig had examined the copy of the trust deed on file in the Recorder's office and inquired of plaintiff whether he had made the monthly deposits called for by this provision, to which plaintiff responded in the affirmative. That plaintiff made these deposits is not questioned.

Defendant asserts that it was agreed by plaintiff that the amount of the principal note, \$500, and interest, \$300, falling due October 4, 1934, and also the taxes in arrears should be prorated as of the date of the contemplated purchase. Plaintiff testified that his price for the property was \$30,000; that defendant, through Orwig, offered \$27,500, to which plaintiff^{made} a counter offer that if defendant would pay \$30,000 he would pay half of the 1934 taxes, and that this proposition was not accepted.

The parties then met at the Chicago Title & Trust Company on August 10, 1934, to enter into an escrow agreement for the purchase of the property; plaintiff and his agent, Kroll, were present, also Orwig and Robert V. Jones, attorney for defendant; plaintiff

was not represented by an attorney. Mr. Jones dictated the terms of the escrow agreement and all parties indicated they were satisfied with it; a warranty deed executed by plaintiff and wife was deposited with the escrow agreement; this deed conveyed the premises to defendant subject to the taxes for 1933 and subsequent years, and to the \$10,000 mortgage. The escrow agreement indicates that the purchase price was \$30,000, and defendant deposited a check for \$20,000. The escrow agreement is on a printed form which was filled out by Mr. Jones. One of the questions in this agreement was, "Have all prorations been made?" to which Mr. Jones wrote the answer, "None thru Escrow." Thus it appears that while this point was raised in the escrow agreement, neither there nor in the warranty deed was there any mention of prorating the amount of the mortgage or interest or taxes.

Defendant argues that parol evidence is admissible to show the real agreement between the parties with reference to prorating the taxes and the mortgage debt, citing cases like Erginger v. Gerrity, 271 Ill. App. 450. But this and other cases cited hold that parol evidence is admissible only to explain some uncertainty or ambiguity, and that parol evidence is not admissible to affect the terms of a contract. The question presented relates to the terms of the sale and these appear clearly and free from any ambiguity both in the escrow agreement and in the warranty deed.

The deed, dated August 10, 1934, provides that the real estate is subject to a trust deed to secure the payment of promissory notes aggregating \$10,000; at that date no part of this indebtedness was due; the first principal note for \$500 fell due October 4, 1934, with \$300 of interest on the principal indebtedness. Shanahan v. Perry, 130 Mass. 460, was an action brought by the grantee against his grantor alleging a violation of a covenant against encumbrances; the deed was made subject to a mortgage deed

to secure \$3500 and the warranty deed covenanted that the premises were free from all encumbrances except this; subsequently the mortgagee demanded and obtained from the grantee \$245 for interest which had accrued on the mortgage before the date of conveyance, and the grantee sued his grantor under the contract of warranty, asserting that his grantor had covenanted against all encumbrances in excess of \$3500; the court held there could be no recovery, saying, that the mention in the deed of an existing mortgage of a certain amount was only by way of description and identification of that mortgage, "which, to the extent of all sums due thereon for principal or interest, is a single incumbrance; and that incumbrance is excepted out of the defendant's covenant." In Trumbull v. Gale, 222 Ill. App., 113, this court approved of the holding in the Shanahan case. In Miller v. Robinson Bank, 34 Ill. App. 460, 471, it was held that by the acceptance of a deed reciting that the grantee takes the land subject to encumbrances, "it is as effectually charged with the incumbrance of the mortgage debt as if the purchaser had expressly assumed the payment of the debt." See also Russell v. Moran, 164 Ill. App. 312; King v. Sea, 6 Ill. App. 189; Goldsmith v. Meyer, 94 N.J.L. 40; Johnson v. Nichols, 105 Iowa, 122. It follows that the defendant, the purchaser, bought the land August 10, 1934, subject to all unpaid taxes for 1933 and subsequent years, and also to all the unpaid portion of the mortgage debt with interest, and that it was obligated for these.

Defendant argues earnestly for the application to these obligations of the moneys deposited by plaintiff with Philipstorn under clause 12 of the trust deed above referred to. It is said that this provision creates a trust fund upon which the prospective purchaser was entitled to rely and could properly conclude that the aggregate of the sums so deposited would be applied on account

on the mortgage indebtedness and taxes. We do not so construe this clause. According to its terms the money deposited was "for the purpose of providing funds for the payment of principal, interest and taxes" when such payments became due, and that such deposits "shall not constitute payment until paid to the persons entitled thereto." We construe this to be a method of guaranteeing the payment of the mortgage debt, with interest and taxes, by accumulating a fund for this purpose. It cannot reasonably be contended that if plaintiff made a contract of sale by which the purchaser in express terms assumed and agreed to pay all arrears of taxes and all of the principal notes and interest subsequently falling due, that plaintiff would not be entitled to recover back from the depository the amounts deposited by him under the provision in the trust deed. The provision that these deposits should not be considered payment until they were in fact paid precludes the idea that they might not be made the subject of a contract entitling the depositor to withdraw them. As we have seen, the contract for the conveyance was subject to all unpaid encumbrances, and it follows that plaintiff was entitled to the amounts deposited with Philipsborn. We hold that the decree, which held that the property was sold subject to the taxes for 1933 and subsequent years, and that plaintiff was entitled to recover \$1420 from Philipsborn, was proper.

It also follows from what we have said that the position of plaintiff in his cross-appeal must be sustained. The master's report and the decree prorated the amount due on the mortgage debt and interest October 4, 1934, as of August 10, the date of the sale, on the theory that equity will do that which should be done - a general equitable principle with which we, of course, agree. But plaintiff properly asserts that while this is generally true, it

has been repeatedly held that a court cannot, in the interest of what it conceives to be equity, make a new contract for the parties. Hodalski v. Hodalski, 181 Ill. App. 158; Loehn v. Hedrick, 198 Iowa, 555; Sprague v. Cochran, 144 N. Y. 104; 21 C. J. 201, sec. 191. Both counsel agree that the decree, which prorates the mortgage indebtedness but does not prorate the taxes, is inconsistent. In this we also agree, and our decision that neither should be prorated removes this inconsistency.

When defendant claimed an interest in the funds deposited by plaintiff with Philipsborn and refused to pay the principal note of \$500 and the semi-annual interest of \$300 becoming due October 4, 1934, plaintiff for his own protection purchased all the principal notes and interest coupons. In plaintiff's amended bill he alleged that he was now the owner of the notes secured by a trust deed, the default of the defendant in payment of the principal note of \$500 and the semi-annual interest due October 4, 1934, and also in the payment of the semi-annual interest coming due April 4, 1935. Shortly after purchasing these notes defendant was advised by plaintiff or his attorneys that all future payment of the notes should be made at the office of his attorneys and not to Philipsborn & Co.; the attorney for the defendant was told by the attorney for plaintiff that the notes were in the possession of plaintiff's attorneys and that all payments should be made at their office; shortly before the next semi-annual interest fell due defendant was again notified in writing that the interest coupon notes were in the possession of plaintiff's attorneys and that payment of same should be made at their office. Defendant refused to do this and insisted that it was required to pay only at the office of Philipsborn & Co. in accordance with the provisions of the trust deed. We do not think the point is important. Apparently Philipsborn was antagonistic to plaintiff's

claim, and the request that the defendant make payments to plaintiff's authorized agents, who had possession of the notes, was reasonable and proper under the circumstances. Defendant's refusal to accede to this request does not commend itself to us. What we have just said is also pertinent to the claim that defendant tendered the amount of principal and interest due. No tender was ever made, either to plaintiff or to his attorneys.

Counsel for defendant make a number of other points which scarcely require comment. Objection is made to the prorating by the master of an insurance premium and taxing the defendant with an amount of \$16.73 and 61 cents for interest. The insurance policy was obtained by plaintiff upon the premises pursuant to a provision in the trust deed authorizing the placing of such insurance, and defendant was properly charged with its share of the premium.

We see no reason to disagree with the allowance to plaintiff's attorney of \$250 as attorney's fees. The extended litigation, as evidenced by the large record and many exhibits, justified the allowance. We are also of the opinion that this expensive litigation might well have been avoided.

Defendant's counsel also say that the court should have ordered plaintiff to pay defendant for costs incurred by it by reason of plaintiff's failure to admit certain facts said to be contained in a notice served upon plaintiff, to which it is said plaintiff did not reply. The notice is said to be served under rule 13(2) of the Supreme court of Illinois. It is sufficient to say that we find no such notice in either abstract or record. This cannot be supplied by printing the notice in the brief.

Plaintiff in his cross-appeal also questions that part of the decree which taxes part of the costs against him. We suppose

this was upon the theory that since the prior mortgage encumbrances on the real estate had been prorated, it was only fair to prorate the costs of the reference. But as we have held that this mortgage encumbrance should not be prorated, it follows there is no basis for taxing any of the costs of the litigation against the plaintiff.

The decree is affirmed except as to those parts which charge against plaintiff any part of the mortgage debt and interest and the fees of the master; such parts of the decree are reversed and the cause remanded with directions to modify it as indicated in this opinion; costs in this appeal to be taxed against the Otco Corporation.

AFFIRMED IN PART AND REVERSED IN PART
AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and O'Connor, J., concur.

39102

JAMES W. SVANTNER et al.,
Appellants,

vs.

PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

238 I.A. 621

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Upon trial of a suit to recover the accidental death benefit provided in a life insurance policy issued by defendant plaintiffs had a verdict for \$2100; the court, however, entered judgment for the defendant notwithstanding the verdict, and plaintiff's appeal.

An ordinary life insurance policy for \$2000 was issued upon the life of John J. Svantner, and an additional \$2000 was promised in case the insured came to his death by accidental means; he died December 10, 1933; defendant paid the \$2000 under the life insurance provision but refused to pay the additional \$2000, and this suit followed. Defendant asserts that the insured did not meet with an accidental death as defined in the policy.

It may be conceded that on a motion for judgment notwithstanding the verdict the trial court has no power to weigh the evidence, but the court should determine from an examination of all the evidence whether plaintiff's, as a matter of law, have a right to recover. Malewski v. Mackiewicz, 232 Ill. App. 593.

Defendant first argues that there is no evidence in the record that the insured received any bodily injuries through accidental means. We cannot agree to this. On the morning of September 28, 1933, insured drove his brother-in-law to his office; the automobile was in good condition - just like new; that morning an Ogden avenue street car collided with the rear of an

automobile driven by a young man approximately of the same appearance both as to weight and height as the insured; the conductor of the street car testified that the young man then gave his name as John Svantner, residing at 2450 S. Central Park avenue; this was the name and the residence of the insured; when the brother-in-law returned home in the evening he saw dents on the car that were not there in the morning; the spare tire on the rear was pushed in, the rear fender smashed, the back end of the car pushed in, the rear window broken and the cushions were ripped out slightly.

The father of the insured testified that when his son returned home that morning the back of the car was smashed in; the insured explained that something had happened that morning, but the witness was not permitted to testify as to what he said. The brother-in-law went with the insured to see a Dr. Hofriechter about two blocks away; insured was stripped to the waist and the Doctor examined him and gave a prescription for some salve to be applied; the brother-in-law observed a red mark close to the spine; the Doctor testified that he found contusions of the right rib, deep injury to the right rib, or spine, and on the right side of the spinal region was a bruise, with evidence of tenderness and pain; the brother-in-law applied the salve as prescribed.

About three days later Dr. Massel called and found the insured lying down and complaining of a severe pain in the middle of his back, also of cramps in the abdomen; after examining him the Doctor said all he found was a discolored bluish and yellowish area in the middle of the back, also a little tenderness in the right front of the chest; the Doctor prescribed the application of a hot water bag or electric pad, and in his office applied heat from a heat lamp; on subsequent days he detected there was more tenderness in the abdomen, with a slight rise of temperature.

It was a fair inference that the insured received an accidental injury in the collision between his automobile and the street car, and beyond doubt he received in some way, by external and accidental means, an injury to his back and side. Defendant argues for the old rule that you cannot base a presumption of death through accident upon a presumption that the insured was injured through accident, but, as we held in Burns v. Prudential Ins. Co. of America, 283 Ill. App. 442, it is not contrary to the law to base an inference on an inference, citing sec. 41, Wigmore on Evidence (2d Ed.) and Sturm v. Employers' Liability Assur. Corp., 212 Ill. App. 354. We hold that the evidence sufficiently proved that the insured received an injury through accidental means.

The important question is, Considering all the evidence can it be held that this accidental injury caused the death of the insured? The policy provides that accidental death benefits shall be paid -

"upon receipt of due proof that the death of the Insured occurred *** as a result, directly and independently of all other causes, of bodily injuries, effected solely through external, violent and accidental means, of which *** there is a visible contusion or wound on the exterior of the body, *** provided, however, that no Accidental death Benefit shall be payable if the death of the Insured resulted *** directly or indirectly from bodily or mental infirmity or disease in any form."

Did the death of the insured come within these provisions?

Dr. Massel further testified that about the middle of October he found a slight swelling of the abdomen and advised that insured be taken to the Cook County hospital, where he was taken the following day and treated by the hospital staff. The patient's abdomen became more and more distended, with high fever and pulse faster, the patient becoming weaker and weaker; he was taken home from the hospital November 22; Doctor Massel saw him daily there until November 25; his condition became more serious,

he was delirious, pulse rate higher, and because of his condition he was sent back to the hospital and on December 2 an exploratory operation was performed; the abdomen was opened but the opening was immediately closed without further operating; he died December 10.

In answer to a hypothetical question Dr. Massel gave it as his opinion, as a reasonable and medical certainty, that the cause of his death could have been by trauma or injury; this opinion was based partly on his observation of insured before September 28, when he appeared to be a robust and healthy individual. The Doctor also testified that when the patient first went to the hospital on October 18 he was suffering from tuberculosis.

The father of insured testified that he lived with him at 2450 S. Central Park avenue, that the son was 21 years of age, weighing about 190 pounds, apparently in perfect health; that the son worked with witness at the steam fitters trade; that he saw him on the morning of September 28 when he left home, that his appearance was "perfect;" that when he returned in the evening he found his son lying down, complaining.

Dr. Kearns, a physician and surgeon for the coroner of Cook County, performed an autopsy on the body of insured; he testified that at this time it weighed 100 pounds; that through the surgical incision in the abdominal wall there escaped foul smelling pus; that he had a huge ulcer over the buttox and prominence of the thigh bone; the Doctor found a wet brain, indicating infection; in the chest there were over two and one-half quarts of foul smelling fluid, causing a compression of the left lung; the right lung was enlarged 50% to compensate for the compressed left lung; the tissues surrounding the lungs were swollen and soft, studded with dark green-black pigment; the heart was swollen and the lining of the heart a color indicating infection; the abdomen and small bowels

adhered to each other; there was purulent fluid in the abdominal cavity; other organs also showed tuberculosis; the adrenal glands, which are above the kidneys, indicated tuberculosis. Dr. Kearns, in answer to a question as to the length of time the patient had been suffering "from this cause," gave it as his opinion that it "was a relative acute process of short duration. I will say several weeks." The witness also gave it as his opinion that tuberculosis could be "activated by trauma," and explained that where one had tuberculosis of the adrenals or of the lymph glands or the mesentery, and received a blow in the abdomen, the change produced in the circulatory system of the abdominal cavity could reasonably activate latent tuberculosis. In answer to a hypothetical question Dr. Kearns said that the condition he found at the post-mortem examination might or could, within a reasonable certainty, have been a result of trauma. He said that the insured's death was "the result of sero-fibrino purulent peritonitis superimposed on tuberculosis-peritonitis. By that I mean sero-fibrino purulent peritonitis is the result of tuberculosis-peritonitis being infected with other organisms than the cause of tuberculosis-peritonitis;" that the patient had tuberculosis in the peritoneal cavity, which was the actual cause of death; he disclaimed knowledge of what causes this tuberculosis, although he repeated that if it was present prior to receiving an injury it could be "activated by trauma."

Dr. Schlack, called by defendant, gave it as his opinion that the patient had been suffering from tuberculosis at least for a period of one and one-half year to two years to cause a condition where the right lung was increased in size 50% and the left lung nearly collapsed and full of fluid; he also gave it as his opinion that where a patient died of sero-fibrous peritoneal adhesion by tubercular peritonitis it would take approximately eight months to a year to develop this condition. This witness said that sero-

fibrous peritonitis is a tubercular disease, usually carried down from the lungs or some other area involved with tuberculosis; that a person could go along for many years and not lose weight and yet have that disease; that sometimes there are no symptoms and still the disease progresses without any symptoms; that it is possible for one to have tubercular ulcers of the bowels and live out the natural life, and that it was possible to have latent tubercular germs in the system and the person die of some other cause; the witness said he had never heard of tubercular peritonitis being caused by trauma.

Dr. Rosenblum, a specialist in tuberculosis and connected with the Cook County and the Municipal Tuberculosis Sanitariums, testified that the enlargement of one lung 50% to compensate for the collapse of the other was a slow process, lasting a year or 18 months; tubercular peritonitis is characterized by the outer linings of the intestines becoming ulcerated and rubbed off, causing the intestines to become matted together; in his opinion it took at least ^{or eight} six/months - probably closer to a year - for this matting of the bowels with adhesions to form; the witness had examined the insured at the Cook County hospital in the early part of October, found a tubercular fusion into the left chest which reflected peritonitis; the witness also said that a man could be in apparent good health for a year and a half with one lung enlarged 50% and the other collapsed, and not know of it; that this would be latent tuberculosis.

It should be noted that when Dr. Kearns gave it as his opinion that insured's condition was a relative acute process of short duration - several weeks - he was referring to the lymphoids in the mesentery supporting the small bowel, and not to the other conditions found. So we must consider the testimony of the two

insie to

Doctors called by defendant as to the length of time required to produce the increased right lung and the collapsed left lung as a period of one and a half to two years, and the length of time to produce the matted intestines, indicating tubercular peritonitis, as requiring nearly a year to form, as uncontradicted. Their testimony must also be considered, as well as that of the plaintiffs, in passing upon a motion for a judgment notwithstanding the verdict.

Respective counsel have cited a large number of cases where recoveries were had or refused where the accidental death benefits were claimed. It would be of no avail to analyze these cases. No two cases involve exactly like facts. The governing principle has been stated by Mr. Justice Cardozo in Silverstein v. Metropolitan Life Ins. Co., 254 N. Y. 81, 84:

"A distinction, then, is to be drawn between a morbid or abnormal condition of such quality or degree that in its natural and probable development it may be expected to be a source of mischief, in which event it may fairly be described as a disease or an infirmity, and a condition abnormal or unsound when tested by a standard of perfection, yet so remote in its potential mischief that common speech would call it not disease or infirmity, but at most a predisposing tendency."

And in Leland v. United Com'l Travelers of America, 233 Mass. 558, 564, the court said with clearness:

"If there is no active disease, but merely a frail general condition, so that powers of resistance are easily overcome, or merely a tendency to disease which is started up and made operative, whereby death results, then there may be recovery even though the accident would not have caused that effect upon a healthy person in a normal state."

The line of distinction seems to be, that where a person has weakened powers of resistance, through general physical frailness, there may be a recovery for accidental benefits, but if the condition is so abnormal and of such a quality or degree as in its probable development would result in death, it may fairly be called a disease causing death. Even if an accident may be said to activate or accelerate a fatal disease, we do not see how it can be said the injury caused the death when in fact the death was caused

by the disease.

The provisions of the policy above referred to declare in clear and explicit language that no death benefit shall be payable if the death results "directly or indirectly from bodily *** disease in any form." Here all the Doctors say the insured died from tuberculosis, which is a disease. Adams v. Milwaukee, 144 Wis. 371. The uncontradicted testimony shows that tuberculosis was in the patient in an advanced stage and for a considerable period before the injury on September 28. The conditions found on the post-mortem were so destructive in their nature that even laymen might make a prognosis of death within a short time.

We are of the opinion that the judgment order entered by the Judge notwithstanding the verdict was fully justified from the evidence, and it is therefore affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

39143

F. H. ANDERSEN, Doing Business as
F. H. ANDERSEN DECORATING CO.,
Appellee,

vs.

MRS. NATHAN HYMEN and HYMEN &
STENHOUSE, INC., an Illinois
Corporation,

Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

283 I.A. 621²

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendants, claiming \$293 as a balance due for decorating two apartments in buildings managed by Hymen & Stenhouse; upon trial by the court Mrs. Nathan Hymen was dismissed by agreement and the court substituted for her Eleanor Maling, a witness who had testified, and entered judgment against her and Hymen & Stenhouse for \$293, from which they appeal. The judgment against Eleanor Maling was improperly entered and is reversed. Biegler v. Hanson, 241 Ill. App. 600.

The argument on behalf of Hymen & Stenhouse is that it is a real estate corporation, acting for certain property owners, that plaintiff knew this, and that under such circumstances it cannot be held liable. The rule is that the agent becomes personally liable only when the principal is not known or when there is no responsible principle, or where the agent becomes liable in an undertaking in his own name. John Spry Lumber Co. v. McMillan, 77 Ill. App. 280.

The evidence in this case shows that defendant had customarily, and in its own name, ordered plaintiff to do decorating in the various buildings operated by it; there is no evidence that defendant ever told plaintiff who owned the buildings or that the defendant would not pay the bills; in fact, the bills for various jobs up to the present controversy, over a considerable period, were

paid by checks from defendant. The fact that after the name of defendant the words, "Trust Account" appear on the checks is of no importance. The court properly held defendant obligated to pay for the work done.

The real dispute seems to be as to the estimated cost of the work submitted to defendant by plaintiff. Plaintiff's testimony tended to show that he made an estimate of \$392 for decorating an apartment in the building at 5103 Ellis avenue, and of \$280 in the building at 5117 Ellis avenue. Defendant introduced evidence tending to show that the proposal for the work at 5103 Ellis avenue was \$325, and for the work at 5117 Ellis avenue, \$250. The court, who saw and heard the witnesses, accepted plaintiff's version as to the amount of the proposals, and we see no sufficient reason to disagree with this conclusion.

It is argued that plaintiff advised defendant that if John H. Breese, an employee of plaintiff, obtained future work from defendant, plaintiff would pay Breese commissions on that work so that Breese could pay his delinquent rental account due to defendant. But plaintiff further testified that Breese earned no commissions on the work in question; that plaintiff was not indebted to Breese, who had not been employed by plaintiff for the past two years.

Complaint is made of the action of the trial Judge in refusing to admit in evidence certain waivers of liens signed by Breese. They were properly excluded, as they did not affect the items of the account in question.

As we have said, the real dispute was as to the estimated cost of the work, and as to this the court, who saw the witnesses and heard them testify, properly could have accepted plaintiff's version.

The judgment against Hymen & Stenhouse, Inc., is affirmed.

REVERSED AS TO ELEANOR MALING,
AFFIRMED AS TO HYMEN & STENHOUSE, INC.
Matchett, P.J., and O'Connor, J., concur.

39017

THE NORTHERN TRUST COMPANY, a
Corporation, as Trustee under
the Last Will and Testament of
Wendell R. King, Deceased,
Appellee,

vs.

WILLIAM J. BRIDGMAN et al.

On Appeal of WILLIAM J. BRIDGMAN,
WENDELL K. BRIDGMAN, FRANCIS K.
BRIDGMAN, ROY K. BRIDGMAN et al.,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

288 I.A. 621³

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The Northern Trust Company, as trustee under the last will and testament of Wendell R. King, deceased, filed its complaint in chancery asking the court to construe the will and instruct the plaintiff as to its duties relating to the disposition of part of the net income of the trust estate. After the issues were made up the cause was referred to a master in chancery. Some exceptions to his report were sustained by the chancellor and a decree entered, from parts of which the defendants Bridgman appeal. The guardian ad litem of certain minor defendants, and as trustee for issue not in being, filed a cross appeal from certain parts of the decree.

For convenience defendants Bridgman will hereinafter be referred to as the Bridgman heirs, those defendants who are satisfied with the decree as adult defendants, and those represented by the guardian ad litem as the minor defendants.

The record discloses that Wendell R. King executed his will in 1883; that he died the next year and his will was admitted to probate in the Probate court of Cook county. After making certain specific bequests he devised and bequeathed all the residue

and remainder of his estate to Charles F. Grey and his successor in trust during the lives of Mary Frances King (the testator's daughter who was then about 16 years old and who, after the death of her father, the testator, married defendant William J. Bridgman), Mattie Virginia King, Amanda King Hard, Solomon E. King and Jane King, and until the expiration of 21 years after the death of the last survivor of these 5 persons. Mary Frances King Bridgman was the last survivor of such five persons and died intestate February 20, 1934, leaving as her only heirs at law the defendants, her husband and 3 sons.

The matter involved in this appeal is, What disposition should plaintiff trustee make of $1/2$ of the net income, or \$5000 annually, - whichever was the greater - during the period of 21 years after the death of the testator's daughter, Mrs. Bridgman, the testator having failed to provide specifically for the disposition of such net income during the 21 years?

The Bridgman heirs contend that such income or \$5000 - whichever is greater - should be paid to them annually under one of 3 different constructions of the will; while the guardian contends that the net income should be accumulated during such 21 years to increase the corpus of the trust fund, and then be distributed as the will specifically provides. The position of the adult defendants is that the Bridgman heirs are entitled to but $1/2$ of such income, as the decree provided.

The will, after making provision for the payment of debts and specific bequests to the testator's wife, devised and bequeathed all the residue and remainder of the estate to the trustee upon the following trusts: (2) That the trustee continue and carry on the business of the Illinois Leather Company owned by the testator. (3) That the "Trustee set apart $4/8$ " (of the net income of the estate) "for the use, benefit and support of

my beloved daughter"*** "That (subject to the reservation and exception hereinafter made)" the trustee pay 1/8 of the income each year to the following persons, - his sister, Mrs. Hard, his brother, Solomon E. King, his sister-in-law, Jane King, (widow of his brother John) and his niece Mattie Virginia King, daughter of his deceased brother; that "In the event of the deceases of any or all of the four named legatees," the bequest should go to the direct issue of such deceased person, if any.

(4) That in case the net income for any year did not exceed \$5,000, then the whole income for such year should be paid to his daughter; that such sum should be annually "reserved *** by my said Trustee for the use of my said daughter" unless the estate failed to yield \$5000 annually; that all other bequests and legacies were subject to this annual payment to the daughter.

By the 5th article the testator appointed Grey guardian and trustee of the daughter, "and I will and direct that as such, he collect, receive and hold the four-eighths of the net income of my estate, hereinbefore allotted to and reserved for my said daughter's use and benefit, paying over to her from time to time, on her sole and individual receipt, such portion thereof as he deems sufficient and proper for her suitable maintenance and support, and investing the remainder, if any, in good income paying securities, for her use and benefit and holding the same, as her trustee." That the amount to be paid to his daughter for her support should not be less than \$5000 per annum unless the income from the estate should be less than that amount. By the 6th article Grey was appointed executor of the estate and guardian of the daughter without bond. The 7th article provided that, "In case of the death of *** Mary Frances King (daughter), Mattie Virginia King, Amanda King Hard, Solomon E. King and Jane King, or any of them, leaving no direct issue, I will and direct that the

bequests herein made to such deceased person or persons, without issue, shall lapse and revert to my estate and be divided pro rata, from time to time, by my said trustee, among the survivors of the above named legatees." By the 10th article the testator directed that the trust estate should continue until the expiration of 21 years after the death of the last survivor of the five legatees. The 11th article is as follows: "On determination of said term, as above, I direct my said trustee or his successor in trust, to wind up and close said business and to divide all of my estate as follows, viz: One half thereof to go to the issue of my daughter *** and $1/8$ thereof each to the issue of said Amanda King Hard, Solomon E. King, Jane King, and Mattie Virginia King and this trust shall thereupon cease and determine. In case of failure of issue to any of the five last above named persons, then such share or shares shall be divided pro rata among the issue of the remaining persons per stirpes and not per capita."

The chancellor found that $4/8$ of the net income derived from the estate during the 21 years period was not disposed of by the will and that it passed as intestate property to the testator's daughter, Mrs. Bridgman, and that since she died intestate, it passed to her heirs - her husband and three sons who are the Bridgman heirs. They appeal, contending that they should have been awarded \$5000 annually if the whole income amounted to that sum. Their position is that the will gave the daughter, Mrs. Bridgman, "a base or determinable fee for the duration of the trust in her share of income, which, upon her death intestate, leaving issue, descended to her heirs"; or if the will is considered to have given Mrs. Bridgman only a life interest, "then the will contains a gift by implication of her share of income to her issue after her death"; or if both these two alternative constructions be rejected, then Mrs. Bridgman's share of the income after her death was entirely undisposed

of by the will and descended as intestate property to the testator's heirs, who are Mrs. Bridgman's husband and three sons.

The first contention was sustained by the master and the last one by the chancellor. The adult defendants make no complaint, except that they contend the net income should be divided equally between the daughter on the one hand and themselves on the other. The guardian disagrees with the master and the chancellor, contending that since no disposition of the income in question was made in the will, it should be accumulated by the trustee, added to the corpus of the estate and then disposed of after the 21 years, as the will provides.

A consideration of the entire will leads us to the conclusion that through an oversight the testator failed to make any disposition of that part of the income in question derived from his estate during the 21 year period, and that such income passed as intestate property to the testator's heir, his daughter, and upon her death, she having left no will, it passed by descent to her heirs - her surviving spouse and three sons. Foss v. State Bank & Trust Co., 343 Ill. 94. In that case the court said (p. 99): "There is no residuary or other clause which directed the trustees to use such surplus income for any other purpose or throw it back into the trust. There are no directions in the will for the accumulation of income to increase the corpus of the trust fund. Testator gave over the corpus of the trust to ultimate legatees but not the income. In such cases, to the extent that the amounts bequeathed fail to completely dispose of the income the will becomes inoperative and testator as to the income not bequeathed dies intestate."

In the instant case there is no direction in the will for the accumulation of the income in question to increase the corpus of the trust fund. And there is no provision in the will for the

payment by the trustee of the income in question to anyone after the death of the testator's daughter, Mrs. Bridgman. There is a provision, however, disposing of that part of the income bequeathed to the testator's sister, his brother, his sister-in-law and his niece. This provision is found in paragraph 3, above quoted.

By reference to the will it appears, we think, that the testator clearly distinguished between the corpus of his estate and the income derived therefrom, as the court held in the Boas case. In these circumstances we hold, as stated, that the income in question descended as intestate property.

The Bridgman heirs further contend that although it be held that the income in question passed as intestate property, yet they are entitled to one-half the net income, or \$5000, annually, - whichever is the greater. On the other side, the adult defendants' position is that under the will $\frac{4}{8}$ of the net income, or \$5000, - whichever is the greater - should be paid to the testator's daughter, Mrs. Bridgman, for her "use, benefit and support," and that such payments obviously ended upon the death of Mrs. Bridgman. The will provides: "I further will and direct that of the net income from my estate, *** my said trustee set apart $\frac{4}{8}$ for the use, benefit and support of my beloved daughter, Mary Frances King (Bridgman) as hereinafter directed. That (subject to the reservation and exception hereinafter made) he pay $\frac{1}{8}$ th of said net income each year to each of the following named persons" (naming the testator's sister, brother, and two other heirs.) The reservation and exception is that if the whole net income for any year does not exceed \$5000 it shall be applied for the use and benefit of the daughter, and the trustee shall pay it over to her "on her sole and individual receipt," or such portion of the \$5000 as he deems sufficient for her "suitable maintenance and support, and investing the remainder, if any, in good income paying securities, for her

use and benefit," and that he hold the same as her trustee. It is obvious that these payments were to be made by the trustee for the daughter's support and maintenance, and ceased upon her death in 1934.

We hold that that part of the net income which the testator gave to his daughter, passed, upon her death, as intestate property. This sum was $\frac{4}{8}$ of the annual net income, or \$5000, - whichever was greater. A reading of the will clearly shows that the testator intended and directed that his daughter was to receive annually not less than \$5000, if the income amounted to that sum. It is expressly provided in the will that "all legacies and bequests *** except those to my wife *** and all payments or disbursements *** are subject and to be postponed to the payment by my estate of at least \$5000 each and every year for the use and benefit of my said daughter." The sister, brother, and the testator's other beneficiaries, to whom he bequeathed $\frac{4}{8}$ of the annual income, were to receive no income until and unless the daughter was paid \$5000; therefore the provision of the decree which provided that they should be paid one-half of the annual income is erroneous.

For the reasons stated the decree of the Circuit court of Cook county is reversed and the cause remanded with directions to modify the decree in accordance with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and McSarely, J., concur.

39115

HENRY MILES,
Appellant,

vs./

CITY OF CHICAGO, a Municipal
Corporation, et al.,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

288 I.A. 622¹

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

April 1, 1935, plaintiff filed a petition against the Civil Service Commissioners and others praying that a writ of certiorari issue directed to the commissioners to certify the had proceedings before them, to quash such proceedings and to restore him to the position of patrolman on the police force of Chicago, from which he claimed to have been illegally discharged. November 26, 1935, plaintiff filed an amended petition. Defendants filed a motion, similar to a special demurrer, to strike the amended petition and to dismiss the suit. The motion was sustained, the suit dismissed, and plaintiff appeals.

The question, then, for decision is the sufficiency of the amended petition.

The material allegations of the petition, so far as it is necessary to state them here, are that on October 5, 1910, plaintiff having passed the required civil service examination was certified by the Civil Service Commission to the position of patrolman on the police force of Chicago; that thereupon he entered upon the discharge of his duties and continued to do so until August 16, 1932; that on August 22, 1932, Captain Larkin of the City police force filed charges with the Civil Service Commission against plaintiff charging that he had been guilty of conduct unbecoming a police officer, that he had been intoxicated, had used profane or insolent language to a citizen, had wilfully mistreated a person, and had unlawfully used a pistol or revolver.

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hard

The petition then alleged that these charges were amplified by specifications filed with the Commission, and goes into considerable detail; that more than five days prior to the hearing of the charges plaintiff was served by the Commission with a copy of the charges and notice of the time and place of the hearing; that the hearing was had, witnesses testified, and afterward on September 2, 1932, the Commission rendered a finding and decision in which it was found that plaintiff had been served with notice five days before the hearing and that the hearing was had, plaintiff was found guilty and discharged. It was then alleged that "none of the evidence or alleged evidence offered on the hearing on said charges" was preserved or made a part of the record of the Commission; that during the hearing the Commission did not observe the "substance of the rules governing trials at law;" that he was denied a fair hearing and not given a full opportunity to present his defense; that the Commission admitted "incompetent and hearsay testimony" against him and refused to admit competent testimony offered by him; that he was not guilty of the charges; that the evidence offered did not show he was guilty but disproved the charges made, and that because of this fact "the finding and decision of the commission was without jurisdiction."

The petition then purports to set up the substance of the testimony heard by the Commission. It was further alleged that prior to the hearing of the charges the rules of the Commission provided that a person found guilty might apply for a rehearing within 30 days after the rendition of the decision; that on September 4, 1932, in conformity with the rules, plaintiff filed a petition for rehearing, but no action was taken; that one of the Commissioners from time to time assured him that a rehearing would be allowed; that plaintiff relied upon this assurance and refrained from sooner filing a petition for writ of certiorari.

Plaintiff contends that the Commission was without jurisdiction to enter the order discharging him because, as his counsel say, it is alleged in the petition that none of the evidence offered on the hearing before the Commission was made a part of the records by the Commission, and "that no evidence tending to show petitioner's guilt was offered at said hearing, and that the decision of the Commission was without jurisdiction." There is no merit in this contention. Hanrahan v. Ames, 277 Ill. App. 312; Carroll v. Houston, 341 Ill. 531.

In the Hanrahan case, the court, speaking by Mr. Justice Wilson, said (p. 316): "The record of the civil service commission in filing its return to the writ of certiorari shows on its face all the necessary jurisdictional facts: First, that the charges were filed; second, that notice was served together with a copy of the charges; third, that a trial was had and witnesses heard; and, fourth, that the petitioner was present and participated in the hearing. These facts as appearing in the record of the civil service commission were amply sufficient to confer jurisdiction on that body. The court was without power to weigh and determine the evidence and the only question with which the trial court was concerned was whether or not the civil service commission had jurisdiction of the petitioner. It was not necessary to certify the evidence and the trial court was limited in its consideration to the record alone. Carroll v. Houston, 341 Ill. 531; Hopkins v. Ames, 344 Ill. 527."

In the instant case the petition shows all of the jurisdictional facts, and since this court has no power to weigh and determine what the evidence shows or fails to show, the Commission, under the authorities cited, had jurisdiction.

Nor is there any merit in plaintiff's contention that he was not guilty of laches in filing his petition on the ground that

he had filed a petition for rehearing before the Commission, and one of the Commissioners had advised him that the rehearing would be allowed, but that the Commission never acted on the petition. In the instant case petitioner was discharged by the Commission on September 2, 1932; he did not file his petition in the instant case until April 1, 1935; and his amended petition was not filed until November 5, 1935. The fact that the Commission did not pass on his petition for rehearing and that one of the Commissioners told him it would be allowed, we think insufficient to warrant plaintiff's delay in filing the petition. The Civil Service Commissioners act as a body and what one of the members may have said to plaintiff is entirely insufficient to warrant us in holding that plaintiff was not guilty of laches. People ex rel. Jahn v. City of Chicago et al., 279 Ill. App. 624. People ex rel. Holland v. Finn, 247 Ill. App. 53.

In the Finn case it was held that one who delays a year and seven months in filing his petition for certiorari to annul an order of the Civil Service Commission for his discharge from the police department was guilty of laches and barred his right to the writ. In that case we said (p. 56): "Petitioner replies that on February 17, 1925, he filed a petition for rehearing and being unschooled in the law supposed that he must await some action on the petition for rehearing before he could file his petition for certiorari, and that it was not until April 1, 1926, that said petition for rehearing was denied. This reply will not avail. The rule with reference to action in civil cases pending the disposition of a petition for rehearing does not apply in civil service cases. Therefore citations relating to judicial practice are not in point. *** In Cox v. Finn, 239 Ill. App. 670, it was held that, even if the rules of the commission did authorize a rehearing, petitioner was not precluded thereby from suing out the writ of

certiorari immediately after her discharge or at least after waiting a reasonable time for action thereon, citing People ex rel. Macauley v. Burdette, 285 Ill. 48."

The judgment of the circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, E. J., and McCurely, J., concur.

39146

SCHOENHOFEN EDELWEISS COMPANY,
a Corporation,

Appellee,

vs.

ARMIN G. KUSSWURM,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

288 I.A. 622²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, the payee of a promissory note for \$1500 dated May 10, 1935, due six months after date, brought suit against the defendant maker to recover the face of the note. Defendant filed an affidavit of merits to plaintiff's statement of claim which, on motion of plaintiff, was stricken and leave given defendant to file an amended affidavit of merits. Thereafter, he filed his amended affidavit of merits which was likewise stricken on motion of plaintiff, and thereupon the court entered judgment on plaintiff's statement of claim for \$1500 and defendant appeals.

In his statement of claim plaintiff set up the note verbatim and also the following endorsement which the note bore: "This note is given as collateral to the note of the Lake County Distributing Co. now held by the Schoenhofen Edelweiss Co."

The defense set up in defendant's amended affidavit of merits was that the note was without any good and valuable consideration - that "the defendant was not, at the time of the giving of said note, indebted to the Plaintiff upon any consideration whatsoever, and that the said promise of the Defendant was a mere naked promise."

Defendant contends that to warrant the holder of an accommodation note to recover he must be a holder for value, and that "a note given upon the understanding that no suit would be brought thereon is without consideration" and unenforceable. The difficulty with this contention is that there is no allegation in

defendant's amended affidavit of merits that the note was delivered by defendant to plaintiff with the understanding that no suit would be brought on the note.

In Elgin National Bank v. Goecke, 295 Ill. 403, the defendant, Goecke, who was manager of the Elgin National Bank, borrowed \$3000 from the National Bank, and Henry Schmidt, president of the Brewing company, guaranteed payment of the note. The money was turned over to defendant Goecke, placed in the bank and checked out to pay the indebtedness of the Brewing company. The note was not paid at maturity but was renewed from time to time. Afterward the Brewing company executed two notes payable to itself and by it endorsed; they were also endorsed by Goecke, Mair, Rogers and others. Afterward Goecke directed that one of these notes be delivered to the bank as collateral security for the note executed by him, which was accordingly done. The bank brought suit on this note against five endorsers. They were all defaulted except Mair and Rogers, who defended the suit. There was a finding and judgment against them, which on appeal was affirmed by the Appellate court and the case taken to the Supreme court where the judgment of the Appellate court was affirmed. The court there said (pp. 406-7): "it is argued by plaintiff's in error that the mere voluntary delivery by the brewery company of the brewery note as collateral security for the Goecke-Schmidt note and the acceptance of such note as collateral for the pre-existing debt, and without agreement for further extension of time or other agreement, does not make the bank a bona fide holder for value and that the defense of want of consideration should have been held by the court as established. It is well established law in this jurisdiction that an indorsee of a negotiable note who has taken it, before its maturity, as collateral security for a pre-existing debt and without

any express agreement is deemed a holder for a valuable consideration, and that he holds it free from latent defenses on the part of the maker."

In the instant case defendant executed the note in question bearing the endorsement that it was "given as collateral to the note of the Lake County Distributing Co. now held by the Schoenhofen Edelweiss Co." Under the law as announced in the Uecker case, plaintiff having taken the note as collateral security for a pre-existing debt and without any express agreement - none being alleged in defendant's amended affidavit of merits - he is deemed a holder for a valuable consideration and holds the note free from latent defenses on the part of the maker.

From what we have said it follows that the court did not err in striking defendant's amended affidavit of merits and entering judgment for plaintiff.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

39152

W. S. MILLER,
Appellee,

vs.

AMERICAN MOTORISTS INSURANCE
COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

288 I.A. 6223

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

William S. Miller brought an action against Bessie Harris to recover damages, and it seems to be conceded that such damages grew out of a collision between the automobiles of plaintiff and defendant, and that plaintiff had a judgment by default against the defendant, Bessie Harris, for \$200. He was unable to have the judgment satisfied and instituted garnishment proceedings in the same case. The American Motorists Insurance Company, a corporation, was served as garnishee, the theory being that the insurance company had issued its policy to Bessie Harris, which would cover the \$200 judgment provided Bessie Harris, the insured, had complied with the provisions of the policy. The Insurance company denied liability on the ground that the insured had failed to turn over to it the summons issued in the original case, as the policy provided. The matter was heard before the court and there was a finding and judgment in plaintiff's favor against the Insurance company for \$206.10, and it appeals.

The record is somewhat confused. In the affidavit for garnishee summons, or statement of claim as it is designated, it is alleged that Miller obtained judgment for \$200 against Bessie Harris on April 18, 1933, and counsel in their briefs seem to concede that this judgment was by default. The record does not contain any judgment of April 18, 1933, but there is in the record

a judgment entered July 10, 1933, in favor of Miller and against Bessie Harris which shows that there was a trial on the merits and a finding and judgment in plaintiff's favor for \$200.

The record discloses that after the collision between the automobiles, the Insurance company took the matter up with the attorneys for Miller and investigated the matter; that some time thereafter Miller brought suit against Bessie Harris, obtained judgment against her, and that the Insurance company had no notice of this suit until well after the judgment was entered.

A witness for the Insurance company testified that she received no summons in the original case and that the first the Insurance company "heard about the judgment was about a year after the accident, when Mrs. Harris made a 'phone call about it. That is the first we knew of any suit." In rebuttal plaintiff Miller testified that when his case was tried against Bessie Harris in the Municipal court an attorney representing the garnishee Insurance company was present. After the close of the case the hearing of which had been continued, the Insurance company offered to prove by a witness that in the ordinary course of business all summons of a similar character would be received by him, and that he received no summons in the Miller case. The Insurance company also sought to show by a witness that Bessie Harris had stated that she had not turned the summons over to the Insurance company, but the offer was excluded by the court, apparently on the theory that defendant had closed his case. In view of the entire record, we think the court should have permitted the Insurance company to call these two witnesses. The insurance policy also provided that if "suit is brought against the Assured to enforce such claim, the Assured shall immediately forward to the Company every summons or other process served upon the Assured." This provision of the policy required the assured,

Bessie Harris, to forward a copy of the summons served upon her to the insurance company. But we think that the failure to forward the summons would not prevent plaintiff from recovering in the instant case if the insurance company had notice of the pendency of the suit so that it could defend.

While, as above stated, the testimony of plaintiff, Miller, is that when his case against Bessie Harris was heard in the Municipal court there was present an attorney representing the garnishee insurance company, yet this is not entirely clear.

Owing to the unsatisfactory state of the record, we think there should be a retrial.

The judgment of the Municipal court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

Matcnett, P. J., and McSurely, J., concur.

38574

THE AMICO COMPANY, Inc.,
a corporation,
Appellant,

v.

JOE ZAROVSKY, JOHN DOE and
MARY ROE,
Defendants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

ADVANCE LAUNDRY MACHINERY &
SUPPLY COMPANY, a corporation,
(intervening petitioner),
Appellee.

288 I.A. 622⁴

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

Plaintiff, Amico Company, Inc., instituted this replevin action in the municipal court to recover a laundry machine known as a 48" Amico extractor, naming as defendants Joe Zarovsky, John Doe and Mary Roe. The extractor was recovered by plaintiff under the replevin writ. The named defendants did not appear and defend. By leave of court the Advance Laundry Machine & Supply Company filed its intervening petition, claiming ownership of the extractor. The issue as to the right of property was tried by the court without a jury and found in favor of intervening petitioner. Judgment was entered on the finding, ordering the extractor delivered to said intervening petitioner. This appeal followed.

The contract of purchase and sale was executed April 18, 1930, by plaintiff and Sam Goldberg, doing business as Smith's Laundry, on one of the Amico Company's printed order forms which contained blank spaces to designate the particular terms upon which the merchandise was sold. There was inserted in writing

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the date, the name and address of Goldberg's business, the description of the extractor, the price of same as \$2,400 with a credit allowance of \$350 for two machines taken in trade and "net cash \$2100." The contract then recites: "In consideration of which the undersigned, Smith's Laundry, agrees to pay to the order of The Amico Company, Inc., \$2100.00 terms: \$100.00 with order; * * * \$2000.00 worth of gold bonds which must be negotiable & bear interest-in 30 days." (Italicized portions of recital written in.) There also appeared on the face of the contract the following provision: "It is expressly agreed and understood that * * * this order * * * when it is accepted by THE AMICO COMPANY, Inc., * * * becomes operative and binding upon both the undersigned and THE AMICO COMPANY, Inc., upon and including all of the terms and conditions printed on the reverse side of this sheet, which are incorporated herein." The following condition appeared on the reverse side of the order form:

"It is understood and agreed that title to the goods hereinbefore described and purchased by this contract shall remain in THE AMICO COMPANY, Inc., until the same shall have been paid for in full as provided, and that said goods shall remain strictly personal property whether placed on a permanent foundation or in whatever manner attached to the structure in which contained, and not in any way be construed as a fixture."

Goldberg paid \$100 upon signing the contract and turned over to plaintiff bonds having a par value of \$2,000 about four weeks after the machine was delivered to him. Upon investigation these bonds were found to be worthless and were returned to and accepted by Goldberg. About one week later other bonds also having a par value of \$2,000 were delivered to plaintiff by Goldberg and these bonds upon investigation were found to have a sales value of from \$8 to \$10 per \$100. They were tendered back to Goldberg, who refused to accept them but repeatedly promised to deliver to plaintiff other bonds having an actual value of \$2,000 or make a cash settlement. Plaintiff turned the bonds over to its attorney. Payment in cash

or bonds having a cash value of \$2,000 was never received by plaintiff. Thereafter, Goldberg, having consolidated his business with another laundry, incorporated same under the name of Smith's Hi-Grade Laundry, Inc. In March, 1934, the corporation went into bankruptcy. April 6, 1934, plaintiff filed its reclamation petition in the bankruptcy proceeding to recover the extractor. Without a hearing on such reclamation petition having been had, by order of court the trustee in bankruptcy on June 29, 1934, sold all of his right, title and interest in and to the assets of the bankrupt corporation for \$1,000 to one R. W. Frieder, who, it is claimed, acted in behalf of the First United Finance Corporation. June 30, 1934, the intervening petitioner entered into a written contract with the First United Finance Corporation for the purchase of the latter's right, title and interest in and to the assets of the bankrupt Smith's Hi-Grade Laundry for \$4,270.78, of which amount \$1,145.78 was paid in cash, the balance to be paid in installments.

One Salk, who claimed to hold a chattel mortgage on all of the chattels of the bankrupt corporation, including the extractor here involved, was restrained by the United States District Court from interfering with the receiver in possession of the bankrupt's assets. The First United Finance Corporation, under its contract with the intervening petitioner, agreed to and did acquire Salk's chattel mortgage for \$1,500, which mortgage was released of record.

Plaintiff contends that the intervening petitioner failed to establish any title to the extractor; that the machine, having been purchased from it by Goldberg under a conditional sales contract, in and by which the title to same was reserved until its purchase price was fully paid, the right of possession and property in the extractor remained in the Amico Company, since Goldberg failed to pay \$2,000 of its purchase price; and that it is not estopped by its conduct or otherwise from asserting its title and ownership.

The theory of the intervening petitioner is that it acquired title to the article in question by purchase from the First United Finance Corporation of (1) title derived through chattel mortgage owned by Salk and (2) of the right, title and interest of the trustee in bankruptcy of Smith's Hi-Grade Laundry; that the contract between plaintiff and Goldberg constituted an absolute sale and not a conditional sale of the extractor; and that, because of plaintiff's failure to assert its alleged right to the property within a reasonable time after the time fixed for final payment, it is estopped from claiming any right as against it.

The major question presented for our determination is whether Goldberg's contract of purchase was a conditional sales contract. In our opinion an examination of the terms of the contract in the light of the provisions of the Uniform Sales act (Ill. State Bar Stats., 1935, ch. 121a, par. 4, et seq.) shows conclusively that the parties expressly agreed to a conditional sale. The following pertinent provisions are contained in that act:

"Par. 23, sec. 20. (1) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.

"Par. 26, sec. 23. (1) Subject to the provisions of this Act where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

Plaintiff's contract with Goldberg was for the sale of a specific article. The seller under the plain terms thereof reserved title to said article until it was fully paid for. Goldberg defaulted in the payments specified and he still owes plaintiff \$2,000 on the purchase price of the machine. There can be no doubt

that the contract between plaintiff and Goldberg was one of conditional sale. The validity of the Uniform Sales act and conditional sales contracts was definitely established in Sherer-Gillett Co. v. Long, 318 Ill. 432, where the court said at pp. 433-34-35:

"Before sales became a subject of uniform legislation it was settled by an overwhelming weight of authority that the seller is not estopped by his conduct in delivering the possession of goods to the buyer upon a contract of conditional sale from asserting his title against one who purchases from the buyer, relying upon the apparent title of the latter, (1 Williston on Sales, - 2d ed. - sec. 324; Harkness v. Russell & Co., 118 U. S. 663, 7 Sup. Ct. 51; Arnold v. Chandler Motors, (R. I.) 123 Atl. 85;) but in this State we had held that a delivery of personal property to the purchaser upon a contract of conditional sale, with a retention of title in the seller, amounts to constructive fraud, which postpones the right of the real owner in favor of those who have dealt without notice with the conditional vendee, who has been given the indicia of ownership. (Gilbert v. National Cash Register Co., 176 Ill. 288; Brundage v. Camp, 21 id. 329.) Uniformity in the law of the several States pertaining to sales being deemed essential to the commercial welfare of the country, leaders of the American bar prepared and submitted to the legislatures of the several States a uniform sales act and a uniform conditional sales act. The former was adopted in this State in 1915 and is the law today. By section 20 of the act the validity of a contract of conditional sale is recognized. Section 23 declares the law of this State respecting the transfer of title to be that theretofore declared by the great majority of the courts of this country. * * * The Uniform Sales act recognizes the validity of such contracts and specifically provides that no title can be passed by the purchaser of goods under such a contract 'unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.'"

It is idle to urge that by the use of the language "\$2,000 worth of gold bonds which must be negotiable and bear interest-in 30 days" written into the contract to designate the time and method of payment of the balance^{due} on the extractor, the parties intended that Goldberg's obligation would be satisfied by delivering to plaintiff gold bonds of \$2,000 par value, even though such bonds were worthless or nearly so. The word "worth" in its usual and ordinary sense as defined in Webster's New International Dictionary means "equal in value to" or "of the value of" and it would do violence to the word as used in the contract to give it any other meaning. As to the suggestion of the intervening petitioner that the quoted language must be construed as meaning that if Goldberg deliv-

ered to plaintiff bonds of \$2,000 par value which were negotiable within thirty days and which bore interest within thirty days, he complied with the terms of the contract as to the payment of the balance due, it is sufficient to state that the suggestion is too fanciful to merit serious consideration. There was a balance of \$2,000 due plaintiff on the extractor and the language employed in the contract reasonably construed can mean only that Goldberg was obligated to deliver to plaintiff within thirty days, in payment of the balance due under the contract, gold bonds equal in value to \$2,000, which were negotiable and bore interest.

The validity of the contract having been established as one of conditional sale, Goldberg had no title to and was not the owner of the extractor, and no right or interest in same could have been acquired through him except his special right in the property to become the owner thereof upon payment in full of the purchase price, unless plaintiff by its conduct is precluded from denying Goldberg's ownership. There is no showing that Goldberg ever even attempted to transfer title to the extractor to the bankrupt corporation, but, assuming that he did, Smith's Hi-Grade Laundry received no better title than Goldberg had and the same is necessarily true of the trustee in bankruptcy. By its purchase of the machine from the trustee in bankruptcy the First United Finance Corporation could acquire no better title than he had and consequently could transfer no better title to the intervening petitioner.

But the intervening petitioner insists that in any event by its contract of purchase from the First United Finance Corporation it acquired title to the extractor derived through the chattel mortgage given by Goldberg to Salk. The difficulty with this position is that when Goldberg executed the chattel mortgage to Salk, he had no legal right to do so in so far as the extractor

was concerned, not being the owner thereof. But, even though we assume that the chattel mortgage was valid, still no title to the machine could have been derived through Salk, the chattel mortgagee, since he never had title himself, either by the foreclosure of the mortgage or by taking possession of the chattel under the mortgage. Neither did the First United Finance Corporation, after its purchase of the chattel mortgage from Salk, foreclose same or take possession of or title to the machine under such mortgage. The purchase of the mortgage from Salk by the First United Finance Corporation and its release of record resulted in its extinguishment, and no title could possibly have been vested in the intervening petitioner by reason of the purchase of said mortgage.

The rule of caveat emptor applies to judicial sales and a sale by a trustee in bankruptcy passes only such title as the trustee possesses. The trustee possessed only such title as the bankrupt had. (Hardin v. Osborne, 94 Ill. 571; Cramer v. Wilson, 202 Ill. 83; In Re Gorood, 138 Fed. 844, Corpus Juris Vol. 7, pp. 230, 242.) The trial court improperly excluded from the evidence the certified copy of plaintiff's reclamation petition filed in the bankruptcy proceeding in the United States District court. The reclamation petition was competent evidence since it was notice to all concerned of plaintiff's claim to ownership of the extractor. With such notice neither the intervening petitioner nor its vendor were innocent purchasers.

It is claimed that, because of plaintiff's unreasonable delay in asserting its rights after Goldberg had defaulted in his final payment under the contract, it is estopped from now asserting them. Under the plain provision of sec. 23 of the Uniform Sales act that "where goods are sold by a person who was not the owner thereof, and he does not sell them under the authority or with the com-

sent of the owner, the buyer acquires no better title to the goods than the seller had unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell," the right of the intervening petitioner, who was not a purchaser from the conditional vendee, to invoke the doctrine of estoppel is open to serious question. In any event there is not a scintilla of evidence in the record that plaintiff made any representation or was guilty of any conduct that might possibly lead the intervening petitioner to believe that the extractor was paid for and that the title to same was in Goldberg. In American Type Founders Co. v. Metropolitan Credit & Discount Corp., 271 Ill. App. 380, where it was urged as it is urged here that the original vendor, having failed to assert its right based upon its conditional sales contract within a reasonable time after the expiration of the time for final payment thereunder, it will be barred from asserting such rights, the court said at pp. 385, 393, 394 and 395:

"The main points here urged by counsel for the Credit Company, as grounds for the reversal of the judgment appealed from are: * * * (2) that 'the law will not permit conditional sales contract holders, who do not repossess the property within a reasonable time after default in the payments, to assert their secret liens against innocent third persons.' * * *

"As bearing upon the contentions of counsel for the Credit company in the present case, the decision and holdings of the United States Court of Appeals for the Seventh Circuit, in the case of In re Steiners Improved Dye Works (McKey, Receiver v. Troy Laundry Machinery Co.), 44 F. (2d) 557, may be referred to. It was there decided in substance that the conditional seller's failure to repossess chattels for over eight months after the last payment became due did not create an estoppel, under the Illinois Uniform Sales Act, in favor of the receiver in bankruptcy of the estate of the conditional buyer. * * *

"There is no statute of limitation, touching the time during which the possession and right of property may be retained by the seller, nor is there any limitation as to the time within which the seller must retake the property in case of default. There is nothing in the statute to indicate that the seller, under such a contract, is subject to any limitation other than the general statute of limitations applicable to written contracts. We see no reason, if the purchase price is not fully paid, why the seller may not act at any time within the period of limitations unless he is estopped."

Other points are urged but in the view we take of this cause we deem it unnecessary to discuss them.

For the reasons stated herein the judgment of the municipal court is reversed and judgment is entered here finding the right of property in plaintiff.

JUDGMENT REVERSED AND JUDGMENT HERE.

Friend and Scanlan, JJ., concur.

38657

THE LINCOLN NATIONAL LIFE
INSURANCE COMPANY, a corporation,
Appellee,

v.

FLORIAN VODNIK et al.,
Defendants below.

THE PETERSEN OVEN COMPANY,
a corporation,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

288 I.A. 622

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a decree in a foreclosure proceeding which found that the lien of a first mortgage trust deed, executed by the owners of the premises involved to secure their indebtedness to plaintiff, Lincoln National Life Insurance Company, was as to two bake ovens in the building on said premises superior to the title reserved by the defendant, Petersen Oven Company, in its conditional sales contract with the aforesaid owners, under which contract such ovens were purchased and installed.

The bill for foreclosure alleged inter alia that the right, title, interest or lien, which defendant had or claimed to have in or to the ovens in said mortgaged premises, was subject, inferior and subordinate to the lien of plaintiff's mortgage.

The material allegations of defendant's answer are that it retained title to, and was the owner of, two Petersen ovens installed by it in the building on the mortgaged premises by virtue of the provisions of a conditional sales contract entered into June 10, 1927,

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between it and Florian Vodnick and Joseph Uhan, owners of the property, and their copartner, Mack Sacio, part of the purchase price of such ovens remaining unpaid; that it was expressly provided in said contract that the ovens should remain the property of the defendant, Petersen Oven Company, until all the payments specified were made in full and that "the attaching of the ovens to the purchaser's building or realty should not be considered as a waiver of title to the oven to the Petersen Oven Company until the purchase price has been fully paid;" that "default having been made by the purchasers under said agreement above set forth, this defendant became and is entitled to remove the said ovens and retain all sums heretofore paid upon the purchase price as liquidated damages for the breach of said agreement and as rental for the use of said ovens; that the title of this defendant in and to said ovens, heating pipes, brickwork and fittings, is not subject to the lien of the trust deed sought to be foreclosed by the complainant in this cause, but on the contrary is prior and superior to the right, title, interest and lien of said complainant and all parties whatsoever in and to said ovens and equipment; * * * that heretofore in a certain foreclosure cause pending in this court, entitled G. Verba v. Florian Vodnick et al., General No. 582419, which is still pending and wherein the complainant therein seeks to subject the premises described in the bill of complaint herein to the lien of an alleged trust deed held by said complainant, John Vojteck, the receiver duly appointed and acting in said cause, was ordered and directed by an order duly entered of record to pay to this defendant the sum of Twenty-five Dollars (\$25) per month until further order of the court, as rental for the use of said ovens, and the said properties of this defendant now remain in and upon the said premises herein sought to be foreclosed by virtue of said order in the payment of said rental."

The undisputed facts show that June 10, 1927, the Petersen Oven Company entered into a written contract with the owners of the property, Florian Vodnick and Joseph Uhan, and their copartner, Mack Sacio, "whereby it agreed to build and install in said premises two Petersen Wide Mouth Door Patent Ovens, 12' x 13' inside measurements and 30' x 16'6" outside measurements for the sum of Seven Thousand Nine Hundred Dollars (\$7,900), said price also including all iron material, heating pipes and brickwork and all necessary fittings, but not including foundation to the floor level of the bakery, chimney or connections with existing chimney, steam connections, connection for oven light, building permit or water tax; that the terms for payment of said ovens were Nine Hundred Dollars (\$900) upon execution of the agreement, Fifteen Hundred Dollars (\$1500) on receipt of iron material, Fifteen Hundred Dollars (\$1500) during the course of construction of the oven, the balance of Four Thousand Dollars (\$4000) on or before fifteen (15) months by promissory note bearing interest at 6% per annum after completion of ovens;" and that said contract contained the following additional conditions:

"1. It is expressly understood and agreed that the above mentioned oven shall remain the property of The Petersen Oven Company until all of the payments above specified are made in full; that all payments prior to the final payment shall stand and be considered as rental for the use of the oven until the purchase price is paid in full; and that payments on account of any note or notes less than the full payment shall not divest or impair the title of The Petersen Oven Company.

"2. In case either of said notes and the interest accrued thereon is not paid when due, and if such default in payment continues for a period of ten days, The Petersen Oven Company may at its option declare the balance of the purchase price immediately due and payable, and may at its option retake possession of said oven, and retain all sums theretofore paid upon the purchase price as liquidated damages for the breach of this contract, and as rental for the use of the oven. The option which is herein granted to retake said oven upon default is cumulative and not exclusive of any other remedies at law or in equity.

"3. In case The Petersen Oven Company should exercise its option to remove said oven, it shall have the right to enter upon the premises and take possession of and remove the oven, and shall not be liable for trespass in so doing, nor shall it be liable for any damages occasioned by the removing of the oven from the premises

The attaching of the oven to the purchaser's building or realty shall not be considered as a waiver of title to the oven by The Petersen Oven Company until the purchase price has been fully paid. On final payment the title shall vest in the purchaser.

"4. The purchaser shall keep the oven insured against loss by fire to the extent of the unpaid balance thereon, for the use and benefit of the vendor, until the purchase price has been fully paid."

It is further undisputed that the Petersen Oven Company furnished all the necessary materials and performed the necessary labor, completing the installation of the ovens by October 25, 1927; that it received on account of the purchase price before and during the construction of the ovens \$3,900; that it thereafter received \$1,000 on account on the principal amount of the note taken by it representing the balance due on the contract; that prior to the filing of plaintiff's bill of complaint herein foreclosure proceedings had been commenced against the premises involved by a junior mortgagee and a receiver was appointed, who was ordered by the court to pay the Petersen Oven Company \$25 a month as and for rental of the ovens; that an order was entered extending said receivership to the instant proceeding; that, including principal and interest, there was due and owing to the Petersen Oven Company \$4,098.69 when it filed its answer herein; and that the last payment received on account of principal, with the exception of the payments made by the receiver as rent for the ovens, was on August 28, 1931.

The following findings of further undisputed facts appear in the decree:

"That the basement and first floor of the premises herein involved were originally constructed for the sole and exclusive purpose of use for a bakery shop and a portion of said premises were constructed for use as living quarters; that at the time of their construction, the ovens hereinabove described were thereupon installed upon foundations of re-enforced concrete brought up from the solid ground upward through the basement of said premises to the level of the bakeshop. That said foundations and a chimney used in connection with said ovens were not erected by the defendant, the said Petersen Oven Company. That these foundations and the chimney in question were erected in accordance with specifications furnished by said defendant, and in accordance with requirements made by it; that said foundations are thirty feet long, and sixteen and one-half feet wide, and are imbedded in the ground about two feet deeper

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than said basement. That these foundations are built independently of the foundation upon which the entire building rests, and there is a clearance in this particular case of several inches between the ovens and the building wall. That the foundations of this particular type would not be necessary in a building to be used for purposes other than baking; that the approximate cost of said foundation at the time of its installation was approximately \$800;

"That the ovens in question are installed so as to rest upon the foundations hereinabove described; that each oven weighs approximately 100 tons, and each one consists of approximately 27,000 bricks, which are solidly cemented to each other. That in addition thereto, each of these ovens has metal parts, such as grates, dampers, flues, flue boxes, and doors. That in laying the brick for said ovens, construction work is commenced by laying down dry brick without the use of mortar so as to allow room to compensate for sliding or expansion of the brick due to the intense heat which emanates from the ovens. That this dry construction is used for about two feet from the bottom of the oven. That thereafter, the brick work is held together with mortar apparently as in the case of ordinary building construction;

"That in order to remove said ovens, it would be necessary with pick-ax or other mechanical instruments to remove the mortar and brick hereinabove described, and piece by piece to remove each individual brick down to the foundation hereinabove described; that it would not be necessary to touch or modify said foundation in order to remove said ovens; further it would be necessary to dismantle the metal parts of said oven in order to remove same from said premises; that if the ovens in question were removed, it would be possible to substitute other ovens in lieu thereof; and, thereupon, to operate said premises as a bakery; that it would be impossible to operate said premises as a bakery without the installation of ovens similar to the ones hereinabove described;

"That the construction and installation of said ovens was entirely completed at the time of the execution of the mortgage hereinabove described, and the notes thereby secured;

"That at the time of the execution thereof, the defendants Florian Vodnick and Frances Vodnik, his wife, were indebted on a mortgage upon the premises herein involved held by one Frank J. Petru. That after a misunderstanding with him, the loan herein involved was negotiated by and through the Northern States Life Insurance Company; that prior to the consummation of said loan and the execution of the documents securing the same, representatives of said Northern States Life Insurance Company inspected the premises herein involved and observed the condition thereof with reference to the installation of said ovens, which had at that time been completed; that said Northern States Life Insurance Company had no knowledge, actual or otherwise of the alleged rights of the defendant Petersen Oven Company, in and to the ovens hereinabove described; * * *."

These findings were also made by the chancellor, based on the master's report:

"16. That all of the aforesaid indebtedness, amounting to \$50,913.98, is due and unpaid * * * and that the complainant * * * has a first, valid and subsisting lien upon said premises for the total amount so due and owing it as aforesaid, and that the rights and interests of all other parties to this cause in and to said

The first part of the report deals with the general situation of the country. It is a very interesting and informative study of the country's development. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country's development.

The second part of the report deals with the economic situation of the country. It is a very interesting and informative study of the country's economic development. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country's economic development.

The third part of the report deals with the social situation of the country. It is a very interesting and informative study of the country's social development. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country's social development.

The fourth part of the report deals with the political situation of the country. It is a very interesting and informative study of the country's political development. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country's political development.

premises are subject and inferior to said complainant's lien upon its said mortgage, and that said The Lincoln National Life Insurance Company is entitled to a foreclosure of said mortgage and to have said premises sold under the directions of this Court for the purpose of satisfying said lien;

* * *

"32. That the ovens in question hereinabove described cannot possibly be removed from the premises herein involved, without material injury to said premises and without practically the complete destruction of said ovens.

"33. That it was the intention of the parties to the conditional sales contract hereinabove described at the time of the execution thereof, that the ovens therein described should be and become permanent parts of the real estate herein involved;

"34. That should the parties to said conditional sales contract have intended that said ovens be and remain chattels, such intention will not, under the facts and circumstances here in evidence be binding as against the complainant, which is a subsequent bona fide mortgagee of the premises herein involved;

"35. That the defendant Petersen Oven Company, the conditional vendor, has failed to assert its right based upon said contract within a reasonable time after the expiration of the time for final payment thereunder; and that as against the complainant, which is the assignee of the bona fide mortgagee which extended credit upon the condition of said premises subsequent to the construction of said ovens, said conditional vendor is estopped from asserting its rights under said contract;

"36. That the defendant Petersen Oven Company has interposed no valid defense to complainant's Bill of Complaint as amended and that said Petersen Oven Company is entitled to no claim or lien as against the complainant in the premises herein involved; * * *."

The decree ordered a sale of the premises in the event the indebtedness due plaintiff was not paid and "that the defendants in this cause, and all persons claiming under them, or any of them, shall be forever barred from all equity of redemption and claim * * * in and to said premises and every part and parcel thereof, which shall have been sold as aforesaid and which shall not have been redeemed according to law."

Defendant insists that the undisputed facts show that the ovens did not lose their character as personal property because (1) the parties to the annexation expressly declared that the chattels be and remain personal property until paid for; (2) such intention is valid and enforceable; (3) plaintiff is but a subsequent lien

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claimant, having no greater rights than its grantors, and in any event the terms of its mortgage are too narrow to include the ovens under the lien thereof; (4) defendant is not estopped to claim title to the ovens as against plaintiff, either by its conduct or by laches, and (5) the ovens can be removed without material injury to the freehold; and contends that the trial court erred in finding that plaintiff has a first valid and subsisting lien on the ovens for the amount found due it as mortgagee, superior to the rights and interest of the defendant and in ordering that said ovens be included as part of the realty in the sale of the premises to satisfy the mortgage lien.

Plaintiff's theory, as stated in its brief, is "that the nature and character of the two baking ovens, the method of annexation and their purpose and adaptation to the premises, constituted them a part of the realty impressed with the lien of the mortgage under foreclosure."

While there is still diversity of opinion in other jurisdictions as to the proper tests and rules applicable under the modern law of fixtures, the law has been definitely declared and settled in this state on the questions presented for our determination on this appeal and contrary decisions of other states can have no bearing on this controversy.

It is impossible to reconcile the inconsistent and contradictory findings of the decree. After having found (1) that the parties to the contract under which the ovens were installed had expressly agreed that, irrespective of the attachment of the ovens to the building or realty, the ownership thereof should remain vested in defendant vendor until the purchase price had been paid in full; and (2) that the ovens were not permanently affixed to the realty and could be dismantled without it being "necessary to touch

or modify said foundation in order to remove said ovens," the chancellor concluded that it was the intention of the vendor and vendees that the ovens "should be and become permanent parts of the real estate" and that "the ovens in question herein above described cannot possibly be removed from the premises herein involved without material injury to said premises."

Early decisions in this country, as well as England, were firm in holding that when personal property become a fixture by annexation to real estate by some permanent method, the personal property lost its identity as such and became part of the realty.

(Bank of Republic v. Wells-Jackson Corp., 358 Ill. 356, 364.)

This rule of affixation was supplanted in more modern decisions which held that chattels, regardless of their annexation to the realty, remained personal property if the intent to have them so remain could be gathered from the conduct or agreement of the parties.

In Sword v. Low, 122 Ill. 487, decided in 1887, where an engine and boiler were the subject of controversy and the intention of the parties was recognized as the major test in determining whether such engine and boiler retained their character as personal property, the court said at pp. 496, 497:

"To determine the irremovable character of a fixture, three tests are, by the modern authorities, applied, viz: 'First actual annexation to the realty, or something appurtenant thereto; second, application to the use or purpose to which that part of the realty with which it is connected is appropriated; and third, the intention of the parties making the annexation to make a permanent accession to the freehold.' Herrman on Chattel Mortgages, 6; Ewell on Fixtures, 21, 22; Tyler on Fixtures, 114; Washburn on Real Prop. 16. * * *

"There seems to be great unanimity in the authorities, that things personal in their nature may retain their character of personalty by the express agreement of the parties, although attached to the realty in such manner as that, without such agreement, they would lose that character, provided they are so attached that they may be removed without material injury to the article itself, or to the freehold. It is not held that parties may, by contract, make personal property real or personal at will, but that where an article personal in its nature is so attached to the realty

that it can be removed without material injury to it or to the realty, the intention with which it is attached will govern; and if there is an express agreement that it shall remain personal property, or if, from the circumstances attending, it is evident or may be presumed that such was the intention of the parties, it will be held to have retained its personal character."

The principles enunciated in the Sword case were adhered to in Schumacher et al. v. Edward P. Allis Company, 70 Ill. App. 557, where, decided in 1896, in holding that an engine, boiler and other manufacturing machinery, although attached to the realty, remained personal property, it was said at pp. 565, 566:

"In the absence of an agreement to the contrary, there is no doubt that the machinery in question attached to the real estate as it was, as between mortgagor and mortgagee, or grantor and grantee, would be held to pass as a part of the realty, but the agreement being legal and binding fixed the character of the property, and unless a removal would work injury to the freehold in consequence of its removal, injury to some substantial and material extent, we can perceive no equitable reason why the mortgagee should be permitted to defeat the intention of the parties."

In Baker v. McClurg, 96 Ill. App. 165, where it was held that baking ovens practically identical in construction with those involved here, together with certain machinery, remained personal property because such was the intention of the parties, the court said at pp. 173, 174:

"And if, when the trade fixture was erected, the tenant, by his conduct, manifested the intention to retain ownership and remove it at the end of the lease, it appears that such intention should control, even if such removal necessitates a reconstruction of the fixture. * * * In this State the intention so manifested is regarded as the principal test to determine the right of removal."

In affirming the Baker case, 189 Ill. 28, the Supreme court adopted the opinion of the appellate court in its entirety.

While the test of intention as the controlling factor in determining whether chattels affixed to the realty retain their character as personal property was thus developed and established, another line of cases applied the constructive fraud-secret lien theory in determining the rights of a vendor to personal property sold by him and affixed to the realty where he reserved the title thereto.

Figure 1

In Fifield et al. v. Farmers' Nat. Bank et al., 148 Ill.

163, the court held at p. 172:

"Sword v. Low, 122 Ill. 487, has been cited, and is relied upon by the appellants. In the case cited an engine and boiler attached to the realty were held to be personal property. But upon an examination of the case it will be found that it was agreed between the vendor and purchaser, when the engine and boiler were sold, that the purchaser should execute and deliver a chattel mortgage on the property to secure the payment of the purchase money. In pursuance of this agreement a chattel mortgage was executed and placed upon record, as required by statute, thereby giving notice to third persons that the property was to be regarded as personal property. But here, however, no chattel mortgage was given to appellants. They relied solely upon a secret agreement made between Day and themselves, that the property should belong to them unless paid for by Day. In the sale of a chattel where the possession of the property passes to the purchaser, a secret lien in favor of the vendor is not valid as against creditors or subsequent purchasers. Chickering v. Bastress, 130 Ill. 216."

With the enactment of the Uniform Sales act (ch. 121a, Ill. State Bar Stats., 1935) which became effective July 1, 1915, the constructive fraud theory became extinct as law in this state. The following pertinent provisions are contained in that act:

"Par. 23, sec. 20. (1) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession of property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.

"Par. 26, sec. 23. (1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

The validity of the Uniform Sales act and conditional sales contracts was definitely established in Sherer-Gillett Co. v. Long, 318 Ill. 432, where the court said at pp. 433, 434-35:

"Before sales became a subject of uniform legislation it was settled by an overwhelming weight of authority that the seller is not estopped by his conduct in delivering the possession of goods to the buyer upon a contract of conditional sale from asserting his title against one who purchases from the buyer, relying upon the apparent title of the latter, (1 Williston on Sales, 2d ed. sec. 324; Harkness v. Russell & Co., 118 U. S. 663, 7 Sup. Ct. 51; Arnold v. Chandler Motors, (R.I.) 123 Atl. 85;) but in this State we had held that a delivery of personal property to the purchaser upon a contract of conditional sale, with a retention of title in

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the seller, amounts to constructive fraud, which postpones the right of the real owner in favor of those who have dealt without notice with the conditional vendee, who has been given the indicia of ownership. (Gilbert v. National Cash Register Co., 176 Ill. 288; Brundage v. Camp, 21 id. 329.) Uniformity in the law of the several States pertaining to sales being deemed essential to the commercial welfare of the country, leaders of the American bar prepared and submitted to the legislature of the several States a uniform sales act and a uniform conditional sales act. The former was adopted in this State in 1915 and is the law today. By section 20 of the act the validity of a contract of conditional sale is recognized. Section 23 declares the law of this State respecting the transfer of title to be that theretofore declared by the great majority of the courts of this country. * * * The Uniform Sales act recognizes the validity of such contracts and specifically provides that no title can be passed by the purchaser of goods under such a contract 'unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.'

In Thuma v. Granada Hotel Corp., 269 Ill. App. 484, decided

by this court in 1933, where Ozite, carpets, In-a-dor beds, china and kitchen cabinets were involved and claimed under a chattel mortgage, in an exhaustive opinion written by Justice Scanlan, reviewing practically the entire field of law on the subject, it was held at p. 494:

"It is undoubtedly true that if the items in question may be removed without material injury to the property and respondent is merely a subsequent mortgagee of the real estate, it is bound by the Granada-Pick chattel mortgage and by the intention of the parties thereto to treat all of the property conveyed as personalty. (See Sword v. Low, supra; 26 C. J. on Fixtures, secs. 46 and 48; 13 A. L. R. 481.) In Jones on Chattel Mortgages (5th ed.) sec. 125, the author says: 'The Courts of a few States, particularly those of New York and Illinois, accord very great efficacy to the mortgagor's agreement that fixtures shall remain chattels, so as to give effect to a chattel mortgage of them, as against subsequent purchasers and mortgagees of the land.'"

In Sears, Roebuck & Co. v. Plaza Bldg. & Loan Ass'n, 276

Ill. 389, where an action of replevin was brought by a vendor of plumbing fixtures, sold under a conditional sales contract against a mortgagee who purchased at the foreclosure sale, the court, after citing and quoting from Sword v. Low, supra, said at pp. 393-394:

"Measured by this rule, it is apparent that appellant and Arst both regarded the plumbing fixtures as personalty, and intended that they should so remain, until the price thereof was fully paid. The conditional sales contracts expressly stipulate that they were to remain the property of appellant until they were fully paid for. This is wholly inconsistent with any idea that they were intended to become part of the realty. We entertain no doubt that

the parties designed and proposed that they were to be, and remain, articles of personalty until paid for, and by their attachment to the building were not to lose their character as such."

The latest expression of our Supreme court on the validity of a conditional sales contract under practically similiar circumstances is found in Bank of Republic v. Wells-Jackson Corp., supra, where an automatic sprinkler system was sold under a conditional sales contract and installed in a building erected on a leasehold. In that case the Bank of Republic sought to include the sprinkler system in the property foreclosed under its trust deed. The owner of the fee, who had forfeited the leasehold, sought to quiet his title free and clear of all liens and claims and the unpaid vendor of said sprinkler system alleged conversion of its chattels and sought recovery therefor. In sustaining the claim of the unpaid conditional sales vendor of the chattels involved, the court used the following language at pp. 362-63-64:

"Prior to the passage of the Uniform Sales act, conditional sales by which the title to the property was reserved in the seller were held by the decisions of this court as being in the nature of secret liens, and constituted constructive fraud as against judgment creditors, mortgagees and purchasers without notice that the title was not in the person in possession of the property. The Uniform Sales act recognizes the validity of conditional sales contracts, and such contracts have been sustained by this court. Sherer-Gillett Co. v. Long, 318 Ill. 432; Dayton Scale Co. v. General Market House Co., 335 id. 342.

"The question next arises whether the sprinkler system has lost its identity as personal property because of the fact that it is bolted and fastened to different portions of the building, or whether it is a trade fixture that can be removed under the contract by which the title was retained in the vendor. Holt v. Henley, 232 U. S. 678, 58 L. ed. 767, involved the right of the vendor, Holt, where title was retained in him pending the payment in full for the chattel sold, to remove a sprinkler system from an industrial plant. The mortgagees claimed title to the sprinkler system under their mortgage, which was made and recorded before the sprinkler system was installed. The mortgage there created a lien upon the existing manufacturing plant and all property 'which may be acquired and placed upon the said premises during the continuance of this trust.' The Supreme Court of the United States held that the property could be removed by the vendor under his conditional sales contract. In passing upon that subject the court said: 'To hold that the mere fact of annexing the system to the freehold overrode the agreement that it should remain personalty and still belong to Holt would be to give a mystic importance to attachments by bolts and screws.' * * *

"The general rule may be deduced from the authorities cited, that where the parties to a contract of sale of personal property in which the title is reserved in the vendor to the chattel sold, agree that by the annexation of such personal property to the real estate the chattel shall not lose its character as personal property, such contract is enforceable between the parties thereto, and also against a purchaser or a prior mortgagee, or those occupying similar positions, where the chattel can be removed without material injury to the freehold or the usefulness of the chattel. Raymond Co. v. Ball, 210 Fed. 217; Campbell v. Roddy, 44 N. J. Eq. 244, 14 Atl. 279; Binkley v. Forkner, 117 Ind. 176, 19 N. E. 753."

In our opinion, under the Uniform Sales act and the rules enunciated in the foregoing cases, the lien reserved by the unpaid vendor, Petersen Oven Company, in the conditional sales contract in the instant case is enforceable against the plaintiff mortgagee, whose interest and title was derived through the vendees, who unquestionably are bound by the terms of said contract. If such a contract is enforceable against a subsequent "purchaser or a prior mortgagee, or those occupying similar positions," as was held in the Bank of Republic case, it logically follows that it must also be enforceable against a subsequent mortgagee. It may well be that when the Uniform Sales act was enacted there should also have been enacted as a companion measure the Uniform Recording act, but that was and is a matter exclusively for the legislature.

The intention of the parties in this case at the time of the annexation of the ovens to the real estate was expressly declared to be that they retain their character as personal property, and the undisputed evidence shows that they "can be removed without injury to the freehold." It is true that the ovens will have to be dismantled to be so removed. So did the sprinkler system in the Bank of Republic case, but that was not considered sufficient to impress the chattels there with a different property character than the parties themselves intended them to retain. Both the ovens and the sprinkler system could be rebuilt out of the materials removed

without permanent impairment of the usefulness of such materials.

In discussing the removability of the ovens in Baker v. McClurg,

96 Ill. App. 165, the court said at pp. 170-171:

"It is also true, doubtless, that the brick structure of the ovens, when removed, would have to be taken down brick by brick; but this need not be injurious to the building or premises if the work should be properly done. We conclude, therefore, that the facts do not justify the conclusion that the ovens became necessarily a part of the building by reason of the purposes for which both building and ovens were constructed, nor that the removal of the fixtures would necessarily injure the freehold.

"But it is said that fixtures are not removable, if by removing them their identity and character as fixtures are destroyed. That taking down the ovens brick by brick and removing the iron of the structure piece by piece would change the form of the original structure for the time being, is made clear by the evidence, and is obvious. It could never again be precisely the same structure of brick and mortar as before, but the iron work could doubtless retain its identity even though taken down in pieces and subsequently re-erected; and there is evidence tending to show that the ovens can be profitably removed and re-erected by the tenant."

The only other question in this case is whether the Petersen Oven Company is estopped by its conduct or by laches from denying the vendees' authority to convey the ovens to the mortgagee. Sec. 23 of the Uniform Sales act, heretofore set forth, provides that "where goods are sold by a person who is not the owner thereof, and he does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

Under the plain provisions of sec. 23 the principle of estoppel may be invoked only by a purchaser from a conditional vendee (Silverthorne v. Chapman, 259 Ill. App. 289), and the right of plaintiff, who was not a purchaser, to invoke the doctrine of estoppel is open to serious question. In any event the evidence is conclusive that the Petersen Oven Company did nothing to lead plaintiff to believe that the property was paid for and that the title was in the vendee mortgagors.

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Was the Petersen Oven Company guilty of laches? The record discloses that it asserted its title and that its claim was allowed for rent of the ovens in the prior foreclosure proceeding brought by the junior mortgagee, the allowance of rent continuing until the master's report was returned in the instant proceeding. In American Type Founders Co. v. Metropolitan Credit and Discount Corp., 271 Ill. App. 380, where it was urged, as it is here, that the vendor having failed to assert its rights based upon its conditional sales contract within a reasonable time after the expiration of the time for final payment thereunder, it will be barred from asserting such rights, the court said at pp. 385, 393-94-95:

"The main points here urged by counsel for the Credit Company, as grounds for the reversal of the judgment appealed from are: * * * (2) that 'the law will not permit conditional sales contract holders, who do not repossess the property within a reasonable time after default in the payments, to assert their secret liens against innocent third persons. * * *

"As bearing upon the contentions of counsel for the Credit company in the present case, the decision and holdings of the United States Court of Appeals for the Seventh Circuit, in the case of In re Steiners Improved Dye Works (McKey, receiver v. Troy Laundry Machinery Co.), 44 F. (2d) 557, may be referred to. It was there decided in substance that the conditional seller's failure to repossess chattels for over eight months after the last payment became due did not create an estoppel, under the Illinois Uniform Sales act, in favor of the receiver in bankruptcy of the estate of the conditional buyer. * * *

"There is no statute of limitation, touching the time during which the possession and right of property may be retained by the seller, nor is there any limitation as to the time within which the seller must retake the property in case of default. There is nothing in the statute to indicate that the seller, under such a contract, is subject to any limitation other than the general statute of limitations applicable to written contracts. We see no reason, if the purchase price is not fully paid, why the seller may not act at any time within the period of limitations unless he is estopped."

The vendee mortgagors have merely a special property right in the ovens and that is their right to ownership of same upon full payment of the purchase price thereof. It is that right only that is subject to the lien of plaintiff's mortgage and that may be sold to

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satisfy said lien. We are impelled to hold that the right and interest of plaintiff mortgagee in and to the two Petersen Ovens is subordinate and subject to the title, ownership and right to possession thereof of the Petersen Oven Company.

The exigencies of modern trade require that personal property be acquired for use in business and that manufacturers of such property extend credit to the purchasers of same. Certain types of chattels must be affixed to the real estate in order to be used. Protection of the property rights of the sellers of such chattels on credit demands that they be permitted to retain title to the property until final payment is made. It was in recognition of the requirements of trade in this regard that the Uniform Sales act was enacted in this state, authorizing a reservation of title by the seller as against not only the buyer but as to all persons holding through such buyer, unless the seller by his conduct precludes himself from denying the authority of his vendee to sell the chattels.

The decree of the Superior court is reversed and the cause remanded with directions to enter a decree in conformity with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

Friend and Scanlan, JJ., concur.

38673

MARY C. KRETZMANN and
JANET MICHAELSON,
Appellants,

v.

AMERICAN DEVELOPMENT COMPANY,
a corporation, and ANDREW
BARTOLI, Jr.,
Appellees.

677
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

288 I.A. 6231

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment entered on the jury's verdict of not guilty in an action brought by plaintiffs, Mary C. Kretzmann and Janet Michaelson, for damages for personal injuries alleged to have been sustained by them through the negligence of the defendants, American Development Co. and Andrew Bartoli, Jr., the owner and driver, respectively, of a truck which was involved in a collision with an automobile in which plaintiffs were riding as guests. No question arises on the pleadings and defendants concede in their brief that plaintiffs were not guilty of contributory negligence.

Plaintiffs' complaint alleged inter alia that January 22, 1934, they were passengers in an automobile owned by one A. W. Welshon, who was driving same in a southerly direction on Indiana avenue and across 74th street at the intersection of said streets in Chicago; that defendants, who were in possession and control of a motor truck, so carelessly and negligently managed and operated the truck in a westerly direction upon and along said 74th street as to cause a collision between it and the automobile

in which plaintiffs were riding; that defendants negligently operated the truck at an excessive rate of speed; that they negligently failed to yield the right of way to the car in which plaintiffs were passengers and which was approaching the intersection from the right; that they negligently failed to keep a proper lookout; and that defendants drove their truck with a conscious indifference to the safety and lives of others and thereby willfully, wantonly and maliciously caused the collision resulting in plaintiffs' injuries.

Plaintiffs' theory is that, while exercising ordinary care and caution for their own safety and while they were passengers in the southbound automobile, they were injured in the collision between that automobile and the westbound motor truck wantonly and willfully or at least negligently operated by defendants.

Defendants' theory is that the negligence of Welshon, the driver of the automobile in which plaintiffs were passengers, was the sole cause of the collision and that that question, as well as the question of defendants' negligence or willful conduct, being peculiarly questions of facts for the jury, the verdict of the jury should not be disturbed, especially in view of the conflicting nature of the evidence.

Plaintiff Janet Michaelson lived with her husband at 11527 Stewart avenue, Chicago. She was sixty-five years old and for several months preceding the accident had been going at varying intervals to the University of Chicago clinic at Billings Memorial Hospital for treatment of ailments from which she suffered. Her coplaintiff and friend, Mary C. Kretzmann, who owned an automobile and was in the real estate business at 11112 South Michigan avenue, usually drove Mrs. Michaelson to and from the hospital. January 22, 1934, Welshon, a friend of both plaintiffs, volunteered to drive Mrs. Michaelson

The first thing I noticed when I stepped out of the car was the cold, crisp air. It was a relief after the warm, stuffy interior. I looked up at the sky, which was a pale, hazy blue. The sun was just starting to rise, casting a soft, golden glow over the landscape. The ground was covered in a layer of frost, and the trees were bare, their branches reaching out like skeletal fingers. I took a deep breath, feeling the cold air fill my lungs. It was a strange feeling, at once refreshing and unsettling. I walked towards the house, my footsteps crunching on the frost. The house was a large, two-story building with a dark, shingled roof. The windows were small and rectangular, some of them with white curtains. The house looked old, but well-maintained. I stood in front of the door, looking at the handle. It was a simple, round knob. I turned it and pushed the door open. The interior was dark, with the light from the windows casting long, shadows. I walked into the living room, which was a large, open space. There was a fireplace on the left wall, and a large, comfortable-looking sofa in the center. The walls were a light color, and the floor was made of polished wood. I looked around the room, taking in the details. It was a nice place, but I felt like I was in a stranger's home. I walked towards the kitchen, which was at the end of the hall. The kitchen was a small, compact space with a white countertop and a sink. There was a stove with four burners, and a refrigerator. I opened the refrigerator, looking for something to eat. There was a carton of milk, a loaf of bread, and some fruit. I took out the bread and a piece of fruit, and sat down at the table. I looked at the clock on the wall. It was 8:00 AM. I had time to get ready for work. I walked back to the living room, where I saw a note pinned to the wall. It was from the owner of the house, welcoming me and telling me that I was free to use the house as I saw fit. I smiled at the note, feeling a sense of relief. I was finally home.

to the hospital in his car and Miss Kretzmann accompanied her. After Mrs. Michaelson had received her treatment, Welshon proceeded to drive the ladies home in his car, Miss Kretzmann occupying the front seat to his right and Mrs. Michaelson the rear seat alone. He drove on various park drives and city streets, finally turning south into Indiana avenue from 67th street. Visibility was diminished and the asphalt pavement on Indiana avenue rendered slippery by a continuous downpour of rain. North of its intersection with 74th street, Indiana avenue is 36 feet, 2 inches wide from curb to curb, and 74th street is 30 feet, 4 inches wide from curb to curb. The grade of the asphalt pavement on both streets was equal and uniform and said pavement was in a state of good repair. The lot on the northeast corner of the intersection was improved with a one-story brick bungalow, which stood 49 feet, 1 inch east of the east curb of Indiana avenue and 40 feet, 11 inches north of the north curb of 74th street. The other three corners were also improved, the intersection being within a closely built-up residential section.

Welshon testified in plaintiffs' behalf, substantially, that he was driving his automobile on the west side of Indiana avenue in the southbound traffic lane at a speed of fifteen miles an hour; that, when he was from forty to fifty feet north of the intersection in question, he looked to the east across the front yard of the Gemeinhardt residence on the northeast corner and did not see defendants' truck or any other vehicle approaching from the east; that he then looked to the west and, seeing no vehicle coming from that direction, continued southward toward the intersection; that as his automobile was entering the intersection he heard Miss Kretzmann "yell" and then for the first time saw defendants' truck about twenty or twenty-five feet east of the intersection, approaching at a speed of at least forty miles an hour; that at that time his automobile was

approaching the center of the westbound traffic lane of 74th street; that the witness immediately turned or attempted to turn his car toward the west into 74th street so as to avoid colliding with the approaching truck; that Bartoli, the driver of the truck, turned toward the south, away from the path of the witness's automobile; that the truck struck a large lamp post at the southwest corner and the automobile of the witness then struck the right side of the truck at about the center; that his car did not move after the impact and was then facing in an almost westerly direction - slightly southwesterly; that both defendants were injured; and that Mrs. Michaelson was driven back to Billings Memorial Hospital and Miss Kretzmann to a doctor's office and then to her home.

Plaintiff Mary C. Kretzmann testified in substance that Welshon was driving south on the west side of Indiana avenue near the curb at a speed of about fifteen miles an hour as he approached and reached the intersection; that when Welshon's car was about forty feet north of the intersection she saw defendants' truck at the alley about one hundred and seventy-five feet east of Indiana avenue coming west on 74th street; that after glancing to the west she again looked east and at that time defendants' truck was near the intersection; that as it was not stopping she screamed and Welshon turned his automobile, which was about at the intersection, toward the west; and that an instant later the vehicles collided a little south of the middle of 74th street and just west of Indiana avenue.

Plaintiff Janet Michaelson testified that she looked when the automobile in which she was riding came to the corner but did not see the truck; that the weather was "very bad," that there was a "terrible bad rain" and that the automobile window was "steamed up;" and that she heard Miss Kretzmann's scream, which was immediately followed by the impact which threw her to the floor of the car.

Defendant Bartoli, the driver of the truck, who was called by plaintiffs as an adverse party under sec. 60 of the Civil Practice act, testified substantially that he was employed by his codefendant American Development Company; that he had been driving west on 74th street for about a mile; that he was alone in the cab of the truck; that the windshield in front of the cab was closed as were the doors on both sides of same; that it was raining hard, "coming straight down;" that raindrops had accumulated on his windshield, as well as on the glass windows in the doors of the cab, cutting down his vision a little, and that it was hard to see through the driving rain; that rain always reduces visibility; that, as he approached Indiana avenue, he was driving in the westbound traffic lane on 74th street; that, when he reached the alley two hundred feet east of the intersection, he looked at the truck's speedometer and noted that its speed was twenty-five miles an hour, that he maintained that same speed practically up to the intersection; that, when he first saw Welshon's automobile, his truck was "a little past the intersection" - out in the intersection of 74th street and Indiana avenue; that at that time the other car was about ten feet away to the north of him; that as he came to the intersection he took his foot off the gas with the motor closed, reducing his speed to something less than twenty-five miles an hour; that he first applied his brakes when he saw the other car coming toward him and at that time also swerved his truck to the southwest to avoid the accident; that he did not hit the curb or lamp post on the southwest corner until Welshon's automobile had struck his truck on the right side; and that both vehicles had gotten over as far west as the west curb near the southwest corner when the impact took place.

Esther Gemeinhardt, whose home was on the northeast corner,

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testified that from her kitchen window about one hundred feet east of the intersection she saw defendants' truck pass at a speed of from thirty to thirty-five miles an hour.

Homer Geller, thirteen years old at the time of the collision, testified that he was walking north on the west side of Indiana avenue and that, when he was about one hundred and fifty feet south of 74th street, he saw Welshon's automobile about half a block north of 74th street being driven south on the right side of the street at a speed of fifteen to twenty miles an hour; that, when he first saw the truck travelling west on 74th street, it was about twenty or twenty-five feet east of the intersection and approaching at a speed of thirty-five or forty miles an hour; that the vehicles came together about in the middle of the intersection, the truck thereafter striking the lamp-post; that Welshon's automobile did not do anything before the accident other than go straight ahead; and that after the collision he saw skid marks extending in an easterly and westerly direction for about twenty-five or thirty feet on 74th street.

Donald Cliff, twelve years old at the time of the trial, testified in substance that about noon on January 22, 1934, he was walking east on the north side of 74th street near the alley half a block west of Indiana avenue; that he saw the westbound truck when it was at the alley east of Indiana avenue, but that he did not notice it very carefully until it came up to the intersection; that he could "form a pretty good opinion of the speed of an automobile coming toward me" and that the truck approached the intersection at a speed of about thirty or thirty-five miles an hour; that its speed was reduced a little as it came up closer to the intersection; that the brakes were applied to the truck and it skidded; that the truck

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stopped near a lamp post at the southwest corner; that he observed skid marks extending eastward from the truck, after it came to a stop, to the east sidewalk of Indiana avenue; that Welshon's automobile entered the intersection before defendants' truck; and that he did not see Welshon's automobile for a sufficient length of time to estimate its speed.

The first question presented for our consideration is whether the verdict was against the manifest weight of the evidence. In our opinion it unquestionably was. Although the verdict of the jury is usually final and binding upon the court as to questions of fact, if it can be seen from an examination of the entire record that the verdict is clearly and manifestly against the weight of the evidence and should have been set aside by the trial court, this court will not hesitate to reverse the judgment on appeal. (Mississippi Lime and Material Co. v. Smith, 232 Ill. App. 361; Donelson v. E. St. Louis Railway Co., 235 Ill. 625; Connors v. Winke, 200 Ill. App. 351.)

As has been heretofore stated, it is conceded on the record brought to us that plaintiffs were not guilty of contributory negligence and the law is settled that the negligence, if any, of Welshon, the driver of the automobile in which they were passengers, cannot be imputed to them.

For a clearer understanding of the facts and circumstances surrounding the collision, we have set forth at considerable length the testimony of all the eyewitnesses which had any material bearing on the occurrence, but, inasmuch as the case will in all likelihood be retried, we refrain from discussing the question of whether or not Welshon was negligent or the testimony of any of the witnesses, except that of Bartoli, the driver of defendants' truck.

Bartoli's own version of the occurrence as testified by him convicts him at least of negligence. He stated that he drove the

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truck westward on 74th street as he approached and practically right up to the intersection at a speed of twenty-five miles an hour over a slippery pavement and through a violent rainstorm which reduced visibility. He admitted that he did not give any warning as he approached the intersection and asserted that he did not see the automobile in which plaintiffs were riding until he had actually entered the intersection.

In Crowe Name Plate & Mfg. Co. v. Dammerich, 279 Ill. App. 103, where conduct found to be negligence as a matter of law was far less aggravated than the conduct admitted by Bartoli in the instant case, the court said at p. 108:

"That appellee's driver failed to look as he came toward the crossing of A street and Florida avenue is manifest. He testified he did not see the taxi until he was at or in the intersection, and that it was then straight ahead of him, and only 10 feet away. That he could have seen it in ample time to have stopped his car, and thus avoided the collision, had he been on the lookout for other vehicles, as the law required him, is obvious. He could not under such circumstances, be heard to say that he did not see the cab, when, had he looked, he necessarily would have seen it. DeBow v. Cleveland, C., C. & St. L. Ry. Co., 245 Ill. App. 158; Grinestaff v. New York Cent. R. R., 263 Ill. App. 589. The driver of appellee's car did not testify that he looked in any direction as he approached the crossing, and the proof thoroughly establishes that he did not do so. This failure to so look was negligence as a matter of law."

We agree with defendants that under the right of way statute, reasonably construed, the car on the preferred highway to the right does not have the absolute right of way across a street or highway intersection under any and all circumstances, and that this court placed a proper construction upon such statute in Heidler Co. v. Wilson & Bennett Co., 243 Ill. App. 89, where it was held at pp. 94, 95:

"In passing on the question of whether due care was exercised by the drivers of the respective cars involved, two principal elements must be taken into consideration, namely, the relative position of the two cars with respect to the intersection and their respective rates of speed. Usually the question of whether, in view of the relative positions of the two cars, with respect to the intersection, and their respective rates of speed, the driver of the car approaching the intersection from the left, should have seen that the cars would or might collide, unless he yielded the

right of way, is one of fact for the jury to determine. Of course, like similar questions of fact, this may sometimes become one of law, but only where, in the opinion of the court, all reasonable minds would reach the same conclusion.

"It would seem to be clear that the statute does not mean that the driver of a vehicle approaching an intersection must yield the right of way to one approaching the same intersection on his right, without regard to the distance that vehicle may be from the intersection when he reaches it or to the rates of speed at which the two vehicles are traveling. When the driver of a vehicle approaches an intersection and he sees another vehicle approaching from the right, at a greater distance from the intersection and at a speed such that, in the exercise of due care, he believes he will be across the intersection before the vehicle approaching from the right reaches it, then, in our opinion, the latter car is not one 'approaching from the right' within the meaning of the statute, and so as to require such driver to stop or yield the right of way."

The rule enunciated in the Heidler case that the relative positions of the two cars and their respective speeds must be considered in determining the rights of the drivers of such cars to precedence in crossing an intersection, could, in our opinion, have been intended to apply only to a driver of a car who, before entering an intersection, observed the position of the other car and noted its speed. How could it possibly apply to a driver on the unpreferred highway who did not until he entered the intersection even see the other car on the preferred highway to his right to either note its position or estimate its speed? We repeat that the negligence, if any, of Welshon cannot be imputed to plaintiffs, and even though he was in some manner negligent as he approached, entered or crossed the intersection, they are still entitled to recover from defendants if Bartoli's negligence was a proximate cause of their injuries.

The verdict in this case, in our opinion, could have been reached only as a result of prejudice engendered in the minds of the jury by erroneous rulings of the trial court upon the evidence. A written statement that had been previously signed by Welshon was offered in evidence by defendants and received without objection. It was obviously introduced on the theory that it impeached the witness. It was not read to the jury prior to the closing argu-

ments. When such arguments had been completed by counsel for both sides, plaintiffs' counsel suggested that such written statement could not be taken to the jury room. At first the trial court ruled that the statement could be taken by the jury upon retirement. The court then changed its ruling and permitted defendants' counsel, over plaintiffs' objection, to read the statement to the jury and pass it among the jurors to inspect and read themselves. We agree with plaintiffs' contention that to permit the statement to be read to the jury at that stage of the trial and to permit the jury to read the statement constituted prejudicial error. It has been repeatedly held in this state that depositions may not be taken by the jury to the jury room. This rule has also been held to apply to the following other documents in the nature of depositions: a written confession (The People v. Spranger, 314 Ill. 602); a written dying declaration (Dunn v. The People, 172 Ill. 582); and a written admission of what a party would testify to if he were present (Smith v. Wise, Stigleman & Co., 58 Ill. 141.)

In People v. Spranger, supra, the court said at p. 612:

"The court permitted the jury to take Theodore's statement to the jury room with them upon their retirement to consider their verdict, overruling the defendants' objection. This was erroneous. It is error to permit the jury to take with them for consideration in the jury room depositions or dying declarations. (Rawson v. Curtiss, 19 Ill. 456; Dunn v. People, 172 id. 582.) The same rule applies to confessions or other instruments of evidence depending for their value on the credibility of the maker."

This rule has been consistently applied to written statements introduced into evidence for the purpose of impeaching a witness. (Nelson v. N. & Elevated R. Co., 170 Ill. App. 119; Johnson v. N. K. Fairbank Co., 156 Ill. App. 381. We think it is just as much a breach of the rule to permit the jury to inspect such a statement while in the jury box as to inspect and read it in the jury room. Even permitting the statement to be read to the jurors at the conclusion of the closing arguments and as the final act of the trial before the court's instruc-

tions was **prejudicial**, but to permit it to be impressed and emphasized on their minds by allowing them to read it was most damaging and highly prejudicial. The prominence given to the statement stressed its importance, coming to the jurors when and as it did, and it may well have caused them to believe that Welshon had been impeached and for that reason plaintiffs were not entitled to recover.

Several other rulings of the trial court on evidence calculated to impeach Welshon and on other matters are complained of, but we think it unnecessary to unduly lengthen this opinion by discussing same, as the improprieties charged are of such a nature that they will hardly recur on another trial.

We are impelled to state that the criticism and abuse of plaintiffs' counsel, as well as the unwarranted and derogatory accusations against them contained in defendants' brief are entirely unjustified and uncalled for. They filed a fair abstract and careful and diligent scrutiny of their briefs reveals neither material nor intentional mis-statement or misrepresentation of the evidence. The intemperate and unfair character of the language of defendants' brief could only have been calculated to distract attention from the weakness of their cause. Particularly applicable to defendants' printed brief and argument is the language of Kline et al. v. Marty, 171 Ill. App. 495, where the court said at p. 504:

"Before discussing the correctness of this decree under the showing of the record, we feel it necessary to advert to the impropriety of much of the appellees' printed argument submitted to us. It is in parts flippant and in passage is abusive of the counsel for the appellants. Attorneys, solicitors and counsel practicing in this court are officers of the court and should treat each other with at least the formal courtesy that such a relation to the court demands. We regard a contrary spirit shown in arguments submitted to us disrespectful to the court as well as to the opposing counsel."

For the reasons indicated the judgment of the superior court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Friend and Scanlan, JJ., concur.

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38692

ALBERT PETERSON et al.,
Appellants,

v.

JASON B. EVANS et al.,
Appellees.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

288 I.A. 623²

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a decree which ordered that the funds of the Amalgamated Union of Operating Engineers (hereinafter for convenience referred to as the Amalgamated) in the hands of M. J. Pufahl, receiver of the Austin National Bank, be distributed rateably to those members of such association who were in good standing April 19, 1930, in proportion to the amounts contributed by them to said funds.

Plaintiffs Albert Peterson, as general president, and Charley Klemz, H. W. Brown and Gregory Zieske, as trustees of the Amalgamated Union of Operating Engineers, a voluntary association, alleged in their bill of complaint filed December 1, 1931, that they were elected and qualified as such officers and that they brought this proceeding on their own behalf and "on behalf of all other members of said Amalgamated Union of Operating Engineers." The defendants named in the bill were Jason B. Evans, who as secretary-treasurer of the aforesaid Amalgamated had deposited the funds in question in the bank and received the receiver's certificate therefor, John Possehl, general president of the International Union of Steam and Operating Engineers, and M. J.

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Pufahl, receiver of the Austin National Bank.

Posschl appeared but was defaulted for want of an answer. Evans and Pufahl answered the bill. Thereafter by leave of court an intervening petition was filed by Douglas L. Abbott and several hundred others, who alleged, inter alia, that they were members in good standing of the Amalgamated on and prior to April 24, 1930, to which petition answers were filed by plaintiffs and defendants Evans and Pufahl.

The original bill sought to determine conflicting claims to the funds in the hands of defendant Pufahl, as receiver of the aforesaid closed bank, and for an order on defendant Evans to turn over to plaintiffs the books of account and the receiver's certificate belonging to the Amalgamated. The intervening petitioners sought to have the funds in question prorated among them.

In addition to ordering the receiver of the bank to pay the funds to Evans for pro rata distribution to the members of the association in good standing on April 19, 1930, the decree ordered that Evans first retain for himself out of the funds a fee of \$100 for his services attendant upon such distribution and that he pay the solicitors of the respective parties, except those representing the receiver, a fee of \$300 each.

Plaintiffs contend that defendant Evans and the intervening petitioners withdrew from the Amalgamated April 19, 1930, and that when they did so their interests in its funds and property ceased and the remaining members became jointly entitled thereto; and "that the withdrawal of any number of members less than the whole did not affect the identity of the association, and those remaining were entitled to carry on and to the use of their property for that purpose."

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1552 J. Neurosci., July 26, 2006 • 26(30):1547–1557

4) Богородица сидит

The theory of defendant Evans and the intervening petitioners, who filed a joint brief in this court, as stated by them is as follows:

"(a) The Amalgamated Union ceased to exist after April 1930, and its funds, therefore, should be distributed to the members in good standing at that time

"(b) Prior to April 1930 the Amalgamated Union consisted of three local unions, 464, 464A and 401. On April 19, 1930, locals 464 and 464A agreed to disband and join local 150 of the International Union of Operating Engineers. Local 401, while it did not adopt a resolution to disband, ceased to function after April, 1930.

"(c) No member of any of these three local unions, except the defendant Evans, paid any dues into the fund in controversy after April 19, 1930.

"(d) Even though it may be held that the Amalgamated Union did continue a legal existence after April, 1930, it held no business meetings, transacted no business, and the members of Local Union 464 and 464A, continued as members of the Amalgamated to the same extent as members of local 401, because the members of local 464 and 464A never withdrew their membership from the Amalgamated Union. There is no provision in the Constitution of the Amalgamated Union which prohibits a member from joining another union. Neither is there any provision that a member of a disbanding local union ceases to be a member of the Amalgamated."

The Amalgamated was a voluntary association, as heretofore stated. When it was organized in 1927, it comprised five local unions, 400, 401, 402, 464 and 464A, each consisting of varying numbers of individual members. It had a constitution as well as laws for the government of the local unions. Local 400 dropped out of the Amalgamated shortly after its organization. Local 402 thereafter consolidated with Local 401, adopting the number of the latter. Each local paid \$100 into the general fund of the Amalgamated at the time of its institution. A death benefit fund was created by assessing the locals \$2 for each member. The general fund and death benefit fund of the Amalgamated were built up by a per capita tax of fifty cents a member a month, which was paid by the local unions out of their general funds, the locals being permitted to charge whatever dues the members thereof decided upon, and out of such per capita tax twenty-five cents a month went into the general fund and twenty-five cents into the death benefit fund of the association. April 19, 1930,

the general fund of the Amalgamated in the Austin National Bank had accumulated to the extent of \$4,128.85 and the death benefit fund to the extent of \$3,287.72. Dividends have been declared amounting to 50% by the receiver of the bank, which bank is still in liquidation.

April 19, 1930, locals 464 and 464A adopted a resolution "that Locals 464 and 464A disband and that the members thereof as a body join Local 150 of the International Union of Operating Engineers." The resolution, practically unanimously adopted, provided for the dissolution of said locals and that after the payment of their debts the surplus funds remaining should be divided pro rata among the members of said Locals in good standing as appears from the books." The funds of these locals were disbursed accordingly.

When locals 464 and 464A disbanded and their members joined the International Union, 401 was left as the only remaining local under the jurisdiction of the Amalgamated. Based on their last per capita tax payments prior to April 19, 1930, Local 401 had one hundred and two members, Local 464 had two hundred fifty-one members and Local 464A had two hundred and fifty-four members in good standing. Plaintiff Peterson testified that he attended a meeting of Local 401 on the Monday following April 19, 1930; that he related to the members present, about sixty in number, what had transpired with reference to Locals 464 and 464A and submitted the question as to whether the members of Local 401 desired to continue as an organization or disband as Locals 464 and 464A had done; that the question was put to a vote and it was decided to continue as a local union; and that April 24, 1930, a meeting of the general officers of the Amalgamated was held for the purpose of discussing the withdrawal of Locals 464 and 464A and that after he, as president of the Amalgamated, had advised the meeting that the office of

secretary-treasurer was automatically vacated by reason of the fact that Evans, the incumbent thereof, was a member of Local 464, which had disbanded, those present at the meeting unanimously elected one Wm. Crooker, who was chairman of the board of trustees, as Evans's successor, and directed him to demand of Evans that he surrender the books, reports and other property of the Amalgamated in his possession, as well as the receiver's certificate, which he had received from Pufahl on account of the funds of the Amalgamated on deposit in the bank. Evans refused to comply with Crooker's demand, but offered to meet with him, audit the books and divide the funds pro rata among those who had contributed to them.

Local 401 continued to hold meetings of a sort until sometime in 1932, when it was decided to suspend payment of dues. There is no satisfactory evidence in the record that Local 401 was in existence thereafter. Peterson testified also that a few perfunctory meetings of the officers of the Amalgamated were held after April 24, 1930, at his or some other officer's home. The Amalgamated received no payments of per capita taxes from Local 401 or revenue from any other source subsequent to April 19, 1930.

The real question presented for our determination is whether under all the facts and circumstances in evidence the funds in controversy should be ordered paid only to plaintiffs and the few, if any, surviving members of Local 401 or distributed to all the members of Locals 401, 464 and 464A, who were in good standing April 19, 1930, in proportion to their contributions to said funds.

The rule is well settled that the withdrawal of any number of members of a voluntary association less than the full membership does not affect the identity of such association or the right of the remaining members to carry on the business thereof and to the use of its property for that purpose. (Freundschaft v. Alchenburger, 235

Ill. 438; Detroit Light Guard Band v. Michigan Independent Infantry et al., 134 Mich. 598; McFadden et al. v. Murphy et al., 149 Mass. 341, 21 N. E. 868.)

If Locals 464 and 464A had withdrawn from the Amalgamated and attempted to take with them its funds and property, under circumstances which showed that the association continued to function and carry out the purposes for which it was organized, the foregoing rule would be applicable. However, an entirely different situation is presented here.

The distinction between Local 401 and the Amalgamated must be clearly drawn. The fact that the former continued to meet and function subsequent to April, 1930, albeit in a desultory fashion, until finally it existed only, if at all, on paper and was little more than a memory, is not conclusive of the issues we are called upon to determine. This cause is concerned primarily with the Amalgamated and the funds in controversy are its funds. After the withdrawal of Locals 464 and 464A was there any reason for the continued existence of the Amalgamated? There was only one local left and no effort was made to organize other local unions. The Amalgamated Union of Operating Engineers as stated in its constitution "shall consist of Local Unions" and the very purpose of its organization was to gather into one cohesive association the several individual unions so that by their united action higher employment standards in the craft might be obtained. The ordinary legal meaning of the word "amalgamate" is to join in a single body two or more associations, organizations or corporations. With 401 as the only one of the local unions still functioning and that about ready to expire there was no longer any reason or necessity for the existence of the Amalgamated.

The obvious purpose of Peterson and the other plaintiffs

in holding the perfunctory meetings of the officers of the Amalgamated, which Peterson testified were held, was, we think, merely to buttress their claim in this cause. Peterson and his three coplaintiffs alleged that "this bill is filed on their own behalf, and on behalf of all other members of said Amalgamated Union of Operating Engineers." It is admitted that Local 401 discontinued holding meetings and collecting dues in the fall or winter of 1932 and that it paid no per capita tax to the Amalgamated subsequent to April 19, 1930. The constitution of the Amalgamated provided that "all local unions that are two months in arrears to the Amalgamated Union shall be suspended until it pays all per capita taxes." Thus, even though we assume that the Amalgamated continued to function, Local 401 stood automatically suspended from the association and was never reinstated. The foregoing provision of the constitution was not abrogated and was not amended. Neither could it have been subsequent to April 19, 1930. The constitution of the association could be amended only at a "convention". No "convention" was held or could have been held because after the withdrawal of Locals 464 and 464A the only person eligible to sit in such convention was one delegate from Local 401 and it is but fair to assume that the framers of the constitution of the association never contemplated a one man convention.

Plaintiffs predicate their right to prevail in this proceeding upon their membership in the Amalgamated through their membership in Local 401. After the automatic suspension of Local 401 for failure to pay its per capita taxes, plaintiffs were no longer members of the Amalgamated and it is idle to urge in avoidance of such suspension that per capita taxes were not paid to Evans by Local 401 because he was not recognized as the general secretary-treasurer of the association after April 24, 1930. It is claimed that Crooker was regularly elected

secretary-treasurer April 24, 1930, to succeed Evans, but it is not even suggested that any per capita taxes were ever paid to him by Local 401 subsequent to said date.

The truth, in so far as we are able to glean it from all the facts and circumstances in evidence, is that subsequent to April 19, 1930, the functions of the Amalgamated became atrophied from disuse, that it did not thereafter perform a single act within the scope of the objects for which it was organized as set forth in its constitution and laws and that it was dissolved for all practical intents and purposes.

Although the members of the disbanded locals represented in number a majority of more than five to one as compared to the members of Local 401, it is not on the theory that as such majority they were entitled to the funds or property of the association that the defendant Evans and the intervening petitioners claim the right to share in the distribution of the funds involved, but rather that, having contributed to such funds, they have as much right in justice and equity as the members of Local 401 to share in the distribution of the same since the Amalgamated no longer continued as an organization after Locals 464 and 464A disbanded. In our opinion the Amalgamated had no real existence subsequent to April 19, 1930, and the meetings claimed to have been held by its officers to carry on the business affairs of the organization were perfunctory only and a mere pretense since no actual business was in fact transacted at such meetings.

The funds ordered distributed were not augmented by a single dollar paid by Local 401 or by plaintiffs, or by any member of said local since April 19, 1930, and we think it would be highly inequitable to turn the funds over to plaintiffs in their entirety. The objects and uses of the association having failed and its operations

having been discontinued, a court of equity had the right to declare it dissolved and to distribute the funds among the contributors to whom they reverted, in proportion to the amounts they respectively contributed. (Burke v. Roper, 79 Ala. 138.)

The decree provides that plaintiffs and such other members of Local 401 as were in good standing April 19, 1930, share in the distribution of the funds on the same basis as the members of Locals 464 and 464A, and we are convinced that its provisions fully and fairly recognize the rights of all the parties as shown by the evidence.

As to the allowance of solicitors' fees to the respective parties, we fail to find any authority for such allowance out of the funds in controversy. Solicitors' fees were not asked for in the pleadings of any of the parties and no petition was filed requesting payment of same or asserting the right to have same paid from said funds. Counsel will have to look for their fees to those who employed them or for proportional contribution from those who accept the benefit of their efforts.

Such ^{other} points as are urged have been considered, but in the view we take of this cause we deem it unnecessary to discuss them.

For the reasons stated herein the decree of the Superior court is affirmed, except that portion of same allowing solicitors' fees. That part of the decree allowing such fees is reversed and the cause is remanded with directions to modify the decree in conformity with the views expressed herein.

AFFIRMED IN PART, REVERSED IN PART
AND REMANDED WITH DIRECTIONS.

Friend and Scanlan, JJ., concur.

38859

VIRGINIA W. HAWKINS,
Appellant,

v.

WILLARD TRICE HAWKINS,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

288 I.A. 623³

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff, Virginia W. Hawkins, seeks to reverse a decree of the circuit court dismissing her bill of complaint for want of equity on the ground that the court lacked jurisdiction of the subject matter.

Plaintiff filed her bill December 14, 1931, alleging that she and defendant, Willard Trice Hawkins, are and have been residents of Chicago, Cook county, Illinois, since 1929; that she and defendant were married May 18, 1917, and lived together as husband and wife until September 18, 1928; that "there was born unto them one * * * child, Willard Western Hawkins, now aged thirteen * * * years;" that July 2, 1929, she was a resident of Juneau, Dodge county, Wisconsin, and at that time and place secured a decree of divorce from defendant on statutory grounds "by default and by publication" against said defendant; that by said decree the custody of the minor child was awarded to her; and that the decree provided that "the question of alimony to be paid by defendant, be held open until the further order of the court."

Plaintiff's bill further alleged that she was without funds and unable longer to support said minor child and that defendant, although adequately capable of supporting her and the child, wil-



fully failed and refused to do so; that defendant is a man of means, has property and conducts various business enterprises in Chicago; that he has remarried and lives in River Forest, Illinois; that his income approximates \$30,000 a year, with a regular salary of about \$1,500 a month as well as other salaries, commissions and bonuses from his various business enterprises; and that he has threatened to fraudulently dispose of his assets rather than pay a reasonable sum toward her support and the support, maintenance, care and education of their minor child. It then alleges that plaintiff is without remedy except in a court of equity and prays that defendant be enjoined from disposing of his assets and that he be required to pay alimony to her and to support the minor child. Attached to and specifically made a part of the bill of complaint in the instant case is an authenticated and exemplified copy of the decree of divorce of the Wisconsin court.

Defendant filed his appearance December 21, 1931, and on December 29, 1931, filed a demurrer averring inter alia (1) that plaintiff's "bill of complaint has no foundation in law or equity," (2) that "this court is without legal or equitable power or authority to pass upon or adjudicate the matters and things alleged in the bill" and (3) that plaintiff has not stated such a case as entitles her to relief in a court of equity.

April 4, 1932, the court entered the decree appealed from, the pertinent and material portion of which reads: "IT IS ORDERED, ADJUDGED AND DECREED, that the demurrer of the defendant to the Bill of Complaint of the complainant, be, and the same is hereby sustained and the complainant's Bill of Complaint is hereby dismissed for want of equity, the court finding that it has no jurisdiction of the subject matter hereof." The trial court allowed plaintiff an appeal to the Supreme Court from its decree and ordered defendant to pay her

\$75 to cover the costs of appeal and \$150 for her solicitor's fees, which sums were paid upon the entry of the decree. The Supreme Court transferred the appeal to this court.

In its opinion in Hawkins v. Hawkins, 350 Ill. 227, transferring the appeal, the Supreme court in disposing of what were urged as constitutional questions said at pp. 229, 230:

"The appellant seeks to justify a direct appeal to this court on the ground that constitutional questions are involved in the case. She asserts that the circuit court, by the dismissal of her bill, violated: first, section 1 of article 4 of the Federal constitution which provides that 'Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State;' second, section 2 of the same article that 'The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;' and third, section 19 of article 2 of the State constitution which provides that 'Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay.'

"By the decree of a court of a sister State the appellant was granted a divorce and the custody of her child and the question of the alimony to be paid by the defendant was reserved for future consideration. The decision of the foreign court upon the issues presented to it and its reservation of the question of alimony were not challenged, but, on the contrary, were respected by the circuit court of Cook county. Hence full faith and credit were given by that court to the decree of the county court of Dodge county, Wisconsin.

"The appellant alleges in her present bill that she is a resident, and she argues in her brief that she is a citizen of this State. The protection designed by section 2 of article 4 of the Federal constitution has no application to a citizen of the State of or concerning whose laws complaint is made. (Bradwell v. Illinois, 83 U. S. (16 Wall.) 130, 138.) No discrimination against a citizen of another State within our jurisdiction nor a denial of his equal privileges and immunities has been charged. Obviously, the section invoked cannot avail the appellant.

"The circuit court, it appears from the decree, dismissed the appellant's bill for the want of equity because the court found that it had no jurisdiction of the subject matter. If the court lacked such jurisdiction, it could not determine the merits of the cause. (People v. Illinois Central Railroad Co., 324 Ill. 591, 614.) The dismissal of a bill, however, for inconsistent reasons and even if manifestly erroneous, does not warrant recourse to section 19 of article 2 of the State constitution. That section does not dispense with an orderly procedure and a decree of dismissal, whether for the want of jurisdiction or the want of equity, is a final order subject to review by an appellate tribunal of competent jurisdiction."

As was said by the Supreme court the decision of the Wisconsin court was not challenged in the trial court but was respected. What plaintiff really contends as to the efficacy of that decision is not that

full faith and credit were not given the decree of a court of a sister state, but that she may use such decree, which did not and could not without personal service upon defendant determine the question of alimony and money for the support of the child, as the authority of the trial court to exercise jurisdiction to decide plaintiff's claim in the instant case. In our opinion the reservation of the question of alimony by the foreign court could be effective only as retaining jurisdiction by that court for the purpose of thereafter determining the question of alimony in the event personal service was had in Wisconsin upon defendant. The Wisconsin court could not enter a decree in personam against defendant and it is difficult to understand how, under the circumstances, its decree could serve as authority for a court of another state to do so. Jurisdiction of the subject matter of a suit at law or in equity must be derived from the sovereign authority or law which organized the tribunal. (Cooper v. Reynolds, 10 Wallace 308, 19 L. Ed. 1931; West Cove Grain Co. v. Bartley, 105 Me. 293, 74 Atl. 730.)

This action then may only be considered as an original independent proceeding, one of the purposes of which is to compel defendant to pay alimony to his divorced wife.

In answer to plaintiff's contention that under the facts alleged in her bill a court of equity in the exercise of its general chancery jurisdiction has inherent power to entertain independent suits for alimony in the absence of a direct legal inhibition, it is sufficient to cite Kelley v. Kelley, 317 Ill. 104, where the court points out that courts never had power in the exercise of their general equity jurisdiction to award payment of alimony and only have such power now to order the payment of alimony as has been conferred upon them by legislative grant. In the Kelley case,

which is decisive of plaintiff's instant contention, the court said at pp. 108, 109:

"The Mosaic law recognized the right of a man to divorce his wife, and under the civil law either party might renounce the marriage union at pleasure. The right of a court to grant an absolute divorce is derived entirely from legislative grant. Prior to the English Divorce act of 1857 the right of the ecclesiastical courts to grant a divorce a mensa et thoro was recognized, but these courts did not have the power to grant a divorce a vinculo matrimonii. They sometimes entered decrees of annulment for causes which rendered the marriage void ab initio, but the only absolute divorces granted in England were by special acts of Parliament. While in this country the matter of granting a divorce involves the judicial process, it has always been recognized that the courts have only such power with respect to granting a divorce absolutely severing and canceling the marital bonds as the legislature sees fit to confer upon them. Where the divorce amounts to nothing more than a separate maintenance, which is the kind of divorce that was granted by the ecclesiastical courts of England, the status of marriage continues, and the power to grant alimony with such a divorce carries with it the power to modify or alter the allowance of alimony to meet new conditions. This is not true, however, with respect to a divorce which destroys the marriage relation. In that case the obligation to support the wife ceases with the severance of the marriage relation except in so far as the decree of divorce by authority of the statute provides for alimony. Unless the statute granting the power to award alimony to the wife authorizes the court to alter the decree to meet new conditions, the decree is like a final decree in any other case and cannot be changed. Ruge v. Ruge, 97 Wash. 51, 165 Pac. 1063, L. R. A. 1917-F, 721. * * * In so far as it is authorized by statute, alimony may be allowed to the wife as a part of a decree for divorce or for separate maintenance, but alimony cannot be allowed on a bill filed for that purpose, alone, (Trotter v. Trotter, 77 Ill. 510.)"

Plaintiff then claims that in any event a court of equity has jurisdiction to enforce the father's continuing liability to properly support his child where an original bill in equity is filed to compel such support.

In Thomas v. Thomas, 250 Ill. 354, it was held at p. 364:

"Neither a want of harmony between a husband and wife relating to the management of their children, nor the right of either to their custody, control, support or education, involves any equitable title or question of an equitable nature. The principles upon which equitable powers are exercised do not sustain the claim that a husband and wife may litigate with each other in a court of equity over the question which one shall have the custody of their children."

If the custody of the child, as held in the Thomas case, cannot be made the subject matter of an independent action in equity, it is obvious that the support of a child cannot be the subject of such an action within the contemplation of the statute and in consonance

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with its general intent. It is unquestionably the law of this state that proceedings for the allowance of alimony and for the support of a minor child or children or for the alteration of such an allowance may be had only in the cause in which the divorce is sought or granted.

We find the statement in defendant's brief that "he has always supported the minor child and is now supporting the minor child, and that the minor child is now living with appellee." While this statement is apart from the record and has no bearing on the issues involved, plaintiff has not seen fit to make any reply disputing it. If true, it reflects a situation radically different than that presented by plaintiff's bill.

For the reasons indicated herein the decree of the circuit court is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.

38562

CHARLES E. FOWLER et al.,
Appellees,

v.

HI-LO FAN CORPORATION,
VICTOR LEINWEBER et al.,
Defendants.

ON APPEAL OF HI-LO FAN
CORPORATION, VICTOR H. LEINWEBER,
CURTIS H. LEINWEBER, deceased,
and WILLIAM H. LEINWEBER,
Appellants.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

288 I.A. 624¹

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiffs filed a minority stockholders' bill against Hi-Lo Fan Corporation and others, seeking to rescind and set aside certain corporate dealings on the ground of fraud, praying for the assignment of a certain patent to the corporation, and for an accounting. Upon joinder of issue the cause was referred generally to a master in chancery, who, after a full hearing, recommended that the bill be dismissed for want of equity. On hearing of plaintiffs' exceptions to the master's report the chancellor sustained the exceptions and entered a decree granting the relief sought. Hi-Lo Fan Corporation, William H., Curtis H. and Victor H. Leinweber have prosecuted this appeal.

It appears from the evidence adduced before the master that Continental Aircraft & Transportation Co., who had been engaged in the experimental and commercial development of helicopters, owned the following patents: (1) United States letters patent No. 1,401,992, issued to William H. Leinweber January 3, 1922, for propeller; (2) United States letters

patent No. 1,344,640, issued to Victor H. Leinweber January 29, 1920, for propeller blades; (3) United States letters patent No. 1,372,441, issued to Curtis H., William H. and Victor Leinweber and Anton Zemann, March 22, 1921, for propeller.

William H. Leinweber, one of the defendants herein, conceived the idea of scaling down the aircraft propeller, protected under these patents, and adapting its design and principle to humidifier fans. He procured a license from Continental Aircraft & Transportation Co., under patent No. 1,372,441, covering a ten year period, to manufacture, sell and use propellers for other than aircraft purposes, and for a period of about one year manufactured fans under this license. In September, 1922, the Hi-Lo Fan Corporation was formed for the purpose of manufacturing these fans. The foregoing patents were duly assigned by the corporation, Continental Aircraft & Transportation Co. reserving to itself the right to use them for aircraft purposes only. For this assignment it received 3,600 shares of the capital stock of Hi-Lo Fan Corporation, which was assigned to Victor H. Leinweber, as trustee. At the same time William H. Leinweber released all rights under his license to the new corporation, together with certain tools, dies and manufactured goods on hand, for which he received 800 shares of the capital stock of Hi-Lo Fan Corporation. In the spring of 1923 stock of the new corporation was qualified for sale to the public, as a class "D" speculative stock under the Blue Sky laws of Illinois. Francis M. Schieble was employed to sell the stock. Each subscription form bore the legend required by the statute, "These are speculative securities."

About a year after the Hi-Lo Fan Corporation was organized the three Leinweber brothers were engaged by the company, Victor as office manager, Curtis as General sales manager, and William as

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production manager, each at the salary of \$300 a month, and their employment was duly approved by the board of directors in October, 1923. The new corporation took over the office of the Leinweber brothers in the Monadnock block, Chicago, and proceeded at first with the production of a small humidior fan and a fan used for Ford automobiles. Lacking space and facilities, the actual manufacture of these fans was contracted for in outside shops, and only the assembly work, boxing, erecting, etc., was attended to by the corporation. A stock sales campaign, under the direction of Schieble, was inaugurated in 1924, and prospective purchasers of stock were invited to the offices of the corporation, where the new uses and adaptations to which the fans were being put were explained and demonstrated by Victor and Curtis Leinweber. Some \$80,000 in stock was sold under Schieble's direction.

From the time the corporation was organized, until 1927, various salesmen and the Leinweber brothers were trying to market its products, but with indifferent success, and in the spring of 1927 the corporation became financially embarrassed and the Leinwebers thereupon made a series of agreements by which they should manufacture and sell fans as individuals under a license from the corporation. The situation at that time, with reference to the patents involved, was as follows: The Hi-Lo Fan Corporation owned patent No. 1,372,441, but by license agreement of March 23, 1927, it granted William H. Leinweber the right to manufacture and sell blades under 12" in diameter for a royalty of 5% of all money received. William H. Leinweber owned patent No. 1,623,420, but by license agreement of March 25, 1927, he granted to Hi-Lo Fan Corporation the right to manufacture and sell blades 12" or larger in diameter, for a royalty of 30% of all money received. In other words, Hi-Lo Fan Corporation had the right to manufacture and sell blades and fans 12" in diameter or

larger, and William H. Leinweber retained the same right on blades and fans under 12".

In the spring of 1928 the Leinwebers interested the Federal Merchandise Co., one of the defendants herein, in taking an exclusive license to manufacture and sell blades and fans under 12" in diameter, and Airmaster Corporation, another defendant, in taking an exclusive license on blades and fans of a diameter of 12" and over. Both of these defendants were responsible concerns. It is the royalties paid to the Leinwebers under the Federal Merchandise Co. agreement which plaintiffs here seek to recover, on the theory that patent No. 1,623,420 belongs to the Hi-Lo Fan Corporation and should be assigned to it, and not to William H. Leinweber, the patentee.

After operating under these various license agreements for approximately two years, the corporation and the Leinwebers again changed the arrangement for the manufacture and sale of fans, through an agreement between William H. Leinweber and the corporation, by which Leinweber was to retain all the royalties received on fans under 12" in diameter, and the corporation was to receive royalties on fans and blades 12" in diameter or over. All moneys received as royalties under these various license agreements have been distributed and paid, and the performance of these contracts is not challenged.

Plaintiffs herein had become stockholders of the Hi-Lo Fan Corporation as a result of the selling campaign of 1924. In 1929, when the security market was at its height, they began to complain that no dividends were being paid on their stock, and indignation meetings were called which finally resulted in a written demand on the directors of Hi-Lo Fan Corporation, dated October 13, 1930, that action be taken to procure the cancellation and abrogation of the license agreement between Continental Aircraft & Transportation

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the system is not a simple one.

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Co. and William H. Leinweber, the cancellation of certificates for 800 shares of common stock issued to William H. Leinweber, to procure for the corporation the ownership of United States letters patent No. 1,623,420, to procure from the Leinwebers, Airmaster Co. and Federal Merchandise Co., a full accounting of all royalties paid or received, and to procure for the corporation the entire beneficial ownership of any application for patents or improvements on patents, filed or in process covering propellers and exhaust fans, and applied for by any of the directors. This demand was referred to counsel, who, replying on behalf of the directors, advised plaintiffs that the matter would be presented at the regular meeting of the board in due course, stating also that there was no legal justification for complying with the demands made and that inasmuch as the books of the company were accessible to the stockholders there was no necessity for any further accounting. None of the plaintiffs appeared before the board as they were invited to do, and November 26, 1930, the bill of complaint was filed.

Plaintiffs presented the cause to the master upon the following theories: (1) That the United States letters patent No. 1,623,420, issued to William H. Leinweber in 1927, long after plaintiffs' became stockholders, should be assigned to the HILLO Fan Corporation, because the patentee, Leinweber, was employed by the corporation at the time application was made for the patent, and the so-called "shop rights" to the invention therefore belonged to the corporation; (2) that in connection with the sale of stock to plaintiffs certain representations were made that "all improvements in fans" would be the property of the corporation; and (3) that the Leinwebers, being directors of the corporation, could not legally deal with corporate assets at a profit to themselves, and therefore

patent No. 1,623,420 should be assigned to the corporation.

The first and third of these theories were apparently abandoned upon argument of the exceptions before the chancellor, who told counsel that so far as these theories were concerned he was in favor of sustaining the master's report, and that he wished to have the argument directed only to the question whether representations were made in connection with the sale of stock that all future patents and improvements would belong to the corporation. At the court's suggestion and request a stipulation was entered into by counsel for both sides, which contained the following recital:

"Pursuant to the suggestion of this court, April 4, 1935, counsel for complainants have submitted the following quotations from the record of alleged representations of certain of the defendants upon which complainants will rely at the hearing now set before this court April 11, 1935. Counsel for defendants have agreed to address themselves to the argument of these representations, and these only."

Attached to this stipulation were excerpts from the testimony of Alvina Lenke, Francis M. Schieble, Charles E. Fowler, Nathan M. Sharpe, Selma Leinweber Wittl, and Katherine Patterson. By consent of the parties the issues were thus narrowed down solely to the question whether the evidence sustained plaintiffs' contention that the representations charged in the complaint were made. Without attempting to analyze in detail the testimony of these various witnesses as disclosed by the excerpts attached to the stipulation, the following summary may be made:

Alvina Lenke testified that she was present at the offices of the Hi-Lo Fan Corporation, Monadnock building, in May, 1924, and that she heard Victor Leinweber say that if there were any new patents on any new improvements they would belong to the fan company.

Francis M. Schieble, sales manager for the corporation, stated that in promoting the sale of stock it was his understanding that all improvements in the fan would inure to the benefit of the corporation; that Victor and Curtis Leinweber had so told him. He

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also stated, however, that he had made an independent investigation before engaging in the sale of stock and that statements made to prospective customers and purchasers were based upon his own investigation.

Charles E. Fowler gave no testimony that would furnish aid to plaintiffs. He merely stated: "To my knowledge, the improvements were made subsequent to 1922. I seen them in the office. They belonged to the corporation. They were brought up there and exhibited. The statements that I relied upon were actually fulfilled."

Nathan M. Sharpe's testimony appears to have no particular bearing on the issue involved. He stated: "I had several conversations with Mr. Schieble in regard to buying the stock, and during those conversations he stated that the patents were the property of the company, and that they had other patents or were applying for patents in Canada. I cannot recall now what the exact fact was there."

Selma Leinweber Wittl testified that she overheard William H. Leinweber tell Mrs. Hammer, a stockholder who is not a plaintiff herein, that improvements would belong to the company; that this conversation took place in the basement of her home, and that she overheard it while upstairs visiting William H. Leinweber's wife.

Katherine Patterson, who had originally invested in stock of the Continental Aircraft & Transportation Co., and later in the Hi-Lo Fan Corporation, testified that she had a conversation with Victor and Curtis Leinweber before purchasing her stock, and that they said that anything in patents that was taken out at any time or place, whether in the United States, Canada or Europe, absolutely belonged to the Hi-Lo Fan Corporation."

Of the six complainants who brought this suit only three testified, Fowler, Patterson and Lenke. Fowler's testimony is to the effect that every representation made to him prior to the time he purchased his stock had been fulfilled. Thus only two complaining stock-

holders, Patterson and Lenke, now charge the Leinwebers with misrepresentation in the sale of stock. The patent, No. 1,623,420, which plaintiffs seek to have assigned to the Hi-Lo Fan Corporation, was taken out in the name of William H. Leinweber, and later one-third interest therein was assigned to each of his two brothers. There is no evidence that William H. Leinweber ever engaged in or had anything to do with the sale of stock in the Hi-Lo Fan Corporation. The statements testified to by the various witnesses were alleged to have been made by the other brothers.

Roswell B. Mason, to whom the cause was referred, made an exhaustive report with findings of fact and his conclusions as to the law applicable to the various theories advanced by plaintiffs. As applicable to the representations alleged to have been made by the Leinwebers in connection with the sale of stock, he concluded:

"I find that there were general conversations between complainants and the defendants Leinweber at different times about the changes in the fan that were being sold and used by the defendants Leinweber and Hi-Lo Fan Corporation, but these conversations related to adaptations of the fans made under U. S. Patent No. 1,372,441. At the time these conversations took place, [1924], the invention subsequently protected by U. S. patent No. 1,623,420, [1927], had not been thought of. No representation was ever made by any of the defendants Leinweber that new patentable inventions, as distinguished from functional improvements, would be assigned to Hi-Lo Fan Corporation. Even if such representations had been made, they related to the future, as distinguished from the present and past, and are not sufficient to uphold any action of fraud or deceit." (Italics ours.)

There is considerable force to the master's finding. All the conversations testified to are alleged to have taken place in 1924, in connection with the selling campaign of Hi-Lo Fan Corporation's stock. The patent which plaintiffs seek to have assigned to the corporation was not issued until 1927, some three years later, and it is difficult therefore to understand how this patent could have been the subject matter of any representations, when, as the master found, the invention covered by this patent "had not [then] been thought of." The master saw and heard these various

witnesses, and while his findings are not conclusive on the chancellor or on this court, the testimony of plaintiffs' witnesses, when taken in connection with the absolute denial of the Leinwebers that any such representations were made, affords no justification for a decree which is so sweeping in its terms as to vest in the Hi-Lo Fan Corporation "all of the improvements which thereafter might be made, invented or developed or acquired by the said defendants or any of them," and thus deprive the Leinwebers from ever receiving any benefit from their individual effort as to new inventions and from the inventive enterprise in which they had spent all their lives. We think that the conversations related by these various witnesses referred only to functional improvements in existing patents, which are not patentable (Atlantic Works v. Brady, 107 U. S. 192.) They were certainly not intended to cover an entirely new invention such as is protected by patent No. 1,623,420, issued some three years after the conversations took place.

This conclusion is supported by the inherent difference between the inventions represented by patents Nos. 1,372,441 and 1,623,420. The former relates to propellers and seeks as one of its principal objects to provide a screw propeller so designed as to exert a thrust evenly distributed from the tip to the hub of a propeller. Propellers, as such, were generally known in the art long before either of these inventions was conceived, but the novelty of this design was a distinct contribution to the art because prior thereto practically all the driving thrust was produced at or near the end or tip of the blades. The invention covered by letters patent No. 1,623,420 was not an improvement on the former patent, but an entirely new design; otherwise it would not have been protected by new letters patent. It was an advance in the art along radically different lines. One of its main

purposes was to provide a propeller to be used for setting fluids, both gaseous and liquid, in motion where the entering edge of the operating surface is in a plane substantially at right angles to the axis of the propeller shaft. In granting this patent to William H. Leinweber, entirely different claims were allowed by the patent office over those advanced in the other invention. Upon this phase of the litigation the master made the following findings:

"I find that in the patent law sense of the word 'improvements' both U. S. Letters Patent No. 1,372,441 and 1,623,420 are improvement patents within Title 35, U. S. C. A., section 31 (R. S. 4886). Neither the patentee of No. 1,372,441, nor the patentee of No. 1,623,420 claims to be an inventor of the machine known as the 'Propeller.' Propellers, as such, were generally known in the art long before these inventions were conceived. Presumably, the two inventions protected by said U. S. Letters Patent Nos. 1,372,441 and 1,623,420 are both patentable, novel and useful. There is a presumption that both letters patent are valid and this presumption has not been overcome or attacked by the complainants. The later invention is not an improvement on the former, but it is patentably different, and both inventions are improvements on propellers. Complainants have not proved any obligation on the part of the defendants Leinweber to transfer U. S. Letters Patent No. 1,623,420 to Hi-Lo Fan Corporation."

In analyzing the evidence upon which the master based his findings, it appears that plaintiffs' witnesses evidently had in mind not the technical thing known as a patent but rather improvements or adaptations covered by the existing patents. They were interested in a device which employed the principle of the big aeroplane propeller and made it adaptable to smaller fans for various uses. None of the witnesses understood the legal difference between patents and improvements on existing patents, and they used these two words interchangeably. Therefore, to attach a technical meaning to the use of the word "patent," as employed by them in their testimony, when it appears reasonably clear that they were referring to improvements in form, size, shape, etc., to fit different uses of an existing patent, and thereby give their testimony so broad a meaning as to include every new invention in propellers and fans that might be made by the Leinwebers in the future, would be giving a meaning to

their statements which under the circumstances was certainly not intended, and the master in making the foregoing findings evidently recognized this difference in arriving at his conclusions.

Various other contentions are argued for sustaining the decree requiring that patent No. 1, 623,420 be assigned to the corporation on the ground that it had acquired so-called "shop rights" in the patent because William H. Leinweber was at the time employed by the corporation; reforming the license agreements with Federal Merchandise Company and Airmaster Corporation, so as to make Hi-Lo Fan Corporation the sole licensor; and directing that all future royalties be paid to the corporation instead of to the Leinwebers; but the master found that as a matter of law Hi-Lo Fan Corporation had no shoprights in the patent, and that the evidence adduced by plaintiffs does not support the charges of fraud made with reference to the license agreements. Plaintiffs also charge a conspiracy between the Leinwebers and the corporation, to divest the latter of its property and assets, but there is no proof to sustain these charges. We think the master's findings of fact were abundantly supported by the evidence and that his conclusions and recommendations should have been followed by the chancellor. The decree of the circuit court is reversed and the cause is remanded with directions to overrule plaintiffs' exceptions and enter a decree in accordance with the master's recommendations.

REVERSED AND REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Scanlan, J., concur.

The first part of the report deals with the general situation of the country. It is a very interesting and informative study of the country's development. The second part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The third part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The fourth part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The fifth part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The sixth part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The seventh part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The eighth part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The ninth part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The tenth part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development.

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CENTRAL FUEL CORPORATION,
Appellant,

v.

LESLIE W. BEAVEN,
Appellee.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

288 I.A. 624²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Central Fuel Corporation, a jobber and wholesale dealer in coal and coke, brought an action in tort against Leslie W. Beaven for conversion of money realized from the sale of coal consigned to him under three written contracts, the first of which was made by Beaven, individually, and the remaining two by the Beaven Company, a corporation which he organized and is alleged to have dominated and controlled. Trial was had by the court without a jury, resulting in judgment against plaintiff, who prosecutes this appeal.

It appears from the evidence that late in January, 1933, Beaven determined to take over an abandoned coal yard which had been vacant for several years and to engage in the retail coal business. He entered into negotiations with plaintiff to furnish him coal and coke on consignment for the purpose of sale, resulting in the execution of an agreement between plaintiff and L. W. Beaven, doing business as Beaven Co., dated February 2, 1933. Under this contract plaintiff agreed to ship to Beaven, who is designated as "factor," coal on consignment, without any charge or expense to him. Beaven on his part agreed to keep the coal separate from other coal

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in the yard, to bear all expense incurred in selling the consigned coal, and to individually guarantee the prompt payment on all sales made by him on credit during any month, at the price of coal at the mine, plus freight, coverage and other charges, promptly on the tenth of the next succeeding month, and to pay daily, upon the same terms, on all coal sold for cash. Beaven agreed to keep books of account showing all sales made in pursuance of the agreement, and to render on or before the fifth day of each month a true and correct statement of all tonnage sold during the month next immediately preceding. As compensation or commission Beaven was to receive the difference between the sale price of the coal and the cost thereof at the mine, plus freight to Chicago. The agreement provided that title to the coal and the right to possession thereof should remain in plaintiff until it was sold, and in the event of Beaven's insolvency or his inability to pay plaintiff, the latter should have the right to reclaim any coal unsold and take possession thereof immediately and without notice.

Deliveries started within a day or two after the contract was executed, and the first payment became due thereunder March 10, 1933, for withdrawals of coal from inventory during February of that year. Beaven testified to conversations had during the month of February with Mr. H. A. Regua, plaintiff's president, and also with R. J. Linn, its assistant secretary and treasurer, wherein he advised them that certain improvements required by law and otherwise necessary in and about the coal yard had to be made, including the repair of scales, a new beam, the replacement of planks on the scale which had rotted, replacement of windows in the office, a coal elevator, and repair of a concrete runway leading to the street and that Regua consented to the use of some of the money realized from

the sale of coal consigned to defendant during February to expedite these repairs. Although Requa and Linn denied the conversations in part, we find from the evidence that in March Beaven made a report on consigned coal withdrawn from the yard during the previous month and enclosed notes in lieu of the payments contemplated by the contract. The delivery of notes in lieu of cash was explained by Beaven as having been necessitated through the outlay of money for operating expenses and in fixing up the yard. The notes were accepted by plaintiff and were later paid.

From a summary of the transactions had under the contract of February 2, we find that plaintiff made deliveries aggregating \$3,396, upon which payments were made by Beaven in the sum of \$1,953.39, leaving coal on hand at the time this contract was superseded by the second agreement in the aggregate value of \$1,442.87, which was assigned and transferred by Beaven to the newly organized Beaven Company, with whom the second and third contracts were made.

During the period of the first agreement Beaven from time to time gave plaintiff notes in lieu of cash, and later paid these notes. Some of the payments extended into June, July, August and September, 1933, and plaintiff takes the position that these payments were made under the terms of the second contract, and, as a matter of bookkeeping they were so credited by plaintiff, but an examination of the record indicates that, although many of the checks were received after the second contract had been executed, they were in fact given on account of withdrawals made under the contract of February 2, 1933. We are satisfied that the first agreement was fully performed, that the method of performance by the payment of notes was consented to and approved by plaintiff, and that Beaven's liability under this agreement was fully discharged.

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The following is a list of the names of the persons who have been elected to the office of the President of the United States since the year 1789. The names are arranged in alphabetical order, and the year of election is given in parentheses. The names of the persons who have been elected to the office of the Vice President are also given, and the year of election is given in parentheses. The names of the persons who have been elected to the office of the President of the United States are: George Washington (1789), John Adams (1797), Thomas Jefferson (1801), James Madison (1809), James Monroe (1817), John Quincy Adams (1825), Andrew Jackson (1829), Martin Van Buren (1837), William Henry Harrison (1841), Zachary Taylor (1849), Franklin Pierce (1853), James Buchanan (1857), Abraham Lincoln (1861), Andrew Johnson (1865), Ulysses S. Grant (1869), Rutherford B. Hayes (1877), James A. Garfield (1881), Chester A. Arthur (1881), Grover Cleveland (1885), Benjamin Harrison (1889), William McKinley (1897), Theodore Roosevelt (1901), William Howard Taft (1909), Woodrow Wilson (1913), Warren G. Harding (1921), Calvin Coolidge (1923), Herbert Hoover (1929), Franklin D. Roosevelt (1933), Harry S. Truman (1945), Dwight D. Eisenhower (1953), John F. Kennedy (1961), Lyndon B. Johnson (1963), Richard M. Nixon (1969), Gerald R. Ford (1974), Jimmy Carter (1977), Ronald Reagan (1981), George H. W. Bush (1989), Bill Clinton (1993), George W. Bush (2001), Barack Obama (2009), Donald Trump (2017).

Sometime during February, 1933, the Boulevard Bridge Bank procured a judgment against Beaven and caused a levy to be made on his coal yard, which was subsequently released because of a time-payment settlement made with the bank. Some of the checks given to the bank were countersigned by Charles R. Ironside, plaintiff's auditor. As a result of this levy and its subsequent release, Beaven organized the Beaven Company, a corporation, with whom plaintiff made the second contract, dated June 7, 1933. The yard was thereupon conveyed to the corporation, and all the coal remaining in the yard, which inventoried at \$1,442.87, was assigned to the new company. This agreement was similar to the contract of February 2, 1933, except that the corporation was named as "factor and agent" of plaintiff. The assignment and delivery by Beaven, of the coal on hand at the expiration of the first contract, to the Beaven Company, with plaintiff's knowledge and approval, and the execution of an agreement by plaintiff with the newly organized Beaven Company, would seem to indicate that Beaven was no longer to be considered personally liable in contract or otherwise for the coal thus taken over by the corporation, because when this coal was later sold by the Beaven Company under the second agreement, plaintiff took notes of the corporation on account, and also accepted payment of these notes in due course by checks of the Beaven Company. One Grethel, plaintiff's assistant secretary, testified that the Central Fuel Corporation did not keep separate accounts for Beaven and the Beaven Company, but that all the \$5,000 worth of coal delivered under these various contracts, and for which plaintiff now sues, appeared on plaintiff's books as being due from the corporation and not from Beaven personally.

Under the second agreement the parties pursued substantially the same course of procedure as under the contract of February 2,

1933. The first payment for coal due under this contract fell due July 10, 1933. R. J. Linn, plaintiff's assistant secretary and treasurer, called at the yard about July 8, 1933, looked over defendant's accounts, checked up on the coal in the yard and talked with Beaven about the coal elevator then being constructed. Beaven testified that Linn agreed to accept a note from the Beaven Company for the June withdrawals, and a note was in fact executed for \$555.21 and delivered to Linn, which was later paid by two checks dated September 29, 1933, and October 11, 1933, and the note was returned to the Beaven Company marked "paid". The next payment fell due under the contract on August 10. Linn called at the yard about that time, inspected the coal piles and again talked with Beaven about some improvements on the property. Beaven gave Linn a report on the July withdrawals and requested that a note be accepted in payment of the amount due. Linn consented and a note for \$681.23, signed by the corporation, was delivered to Linn. Under the same circumstances the Beaven Company gave Linn a note on September 14, 1933, for the August withdrawals, and another on October 18 for the September account. These notes represented payments due for July, August and September, aggregating \$1,841.58, and were due at the time the petition in bankruptcy was filed against the corporation. Under a reasonable construction of the second agreement, Beaven Company was not obliged to deliver the proceeds of sales to plaintiff in specie, but rather to pay for all sales by the tenth of the month following. By accepting notes in lieu of cash, plaintiff extended the time within which the various payments became due, but it certainly cannot be held that these extensions made Beaven personally liable in trover on plaintiff's theory of the case.

When the third contract, dated November 1, 1933, was executed, plaintiff took cognizance of the indebtedness, amounting to \$1,841.58,

1. The first part of the report is devoted to a general

description of the work done during the year.

2. The second part contains a detailed account of the

results of the experiments carried out.

3. The third part discusses the theoretical aspects of the

work and compares the results with the theoretical predictions.

4. The fourth part contains a summary of the work done

and a list of references.

5. The fifth part contains a list of the names of the

persons who have assisted in the work.

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remaining due under the second contract, and provided that, except for actual operating expenses of the coal yard, and \$20 a week to be paid to Beaven, individually, no commissions should be credited to the Beaven Company, as agent, until the indebtedness of \$1,841.58, still due plaintiff from the corporation, should be paid in full. This agreement provided that plaintiff's auditor should check the receipts and disbursements of the Beaven Company, approve credits where coal was sold on credit, that all money be deposited in the Miles Center State Bank, and that checks for disbursements be signed by Beaven as president, and countersigned by Ironside, as auditor, the latter being designated by plaintiff as a signatory on the account at the bank. These provisions were fully carried out by the Bevean Company, and all collections made subsequent to November 1, 1933, were deposited in the bank designated, except some \$80 for petty cash items. Ironside visited the Beaven Company's coal yard frequently during November and December, 1933, and at all times had access to its books and records, from which he took statements at will. He also countersigned checks during this period and supervised all expenditures, and we find no indication in the record that any of the provisions of this agreement were violated by the Beaven Company.

In December, 1933, the corporation owed plaintiff a considerable balance for coal that had been consigned to it, and plaintiff attempted to take over the Beaven Company. A request was made that all stock of defendant corporation be turned over to plaintiff, and that Beaven resign as president, and receivership proceedings were threatened as an alternative. The Beaven Company had then established a going business. As of December 31, 1933, its accounts receivable aggregated \$2,977.92, coal on hand inventoried at \$579.18, there was other material on hand the value of which does not appear in

the record, and certain cash. Defendant contends that the assets of the corporation were then in excess of \$3,557.10, as against a total indebtedness of \$5,054.57, of which \$1,841.58 was invested in improvements in the coal yard, and that plaintiff was not in jeopardy of loss. No plausible reason appears for abruptly terminating the agreement at that time, and defendant's counsel suggests that plaintiff was motivated by a desire to take over a valuable outlet for its products, and because Beaven and other stockholders of his company refused to comply with plaintiff's demand, the contract was arbitrarily cancelled. Following its termination by plaintiff, an involuntary petition in bankruptcy was filed against Beaven Company, January 5, 1934, and in due course the Beaven Company delivered all its money, accounts receivable and other assets to the trustee in bankruptcy. Plaintiff sought to collect the debt due from the Beaven Company in the bankruptcy proceedings, but after the costs of administration and other expenses were paid, very little remained. The instant proceeding was thereafter instituted against Leslie W. Beaven on the theory that he as an individual under the contract of February 2, 1933, and later as president of the Beaven Company, which he is alleged to have dominated and controlled, converted the proceeds of the sale of coal to himself and to the corporation under the three agreements hereinbefore set forth.

Plaintiff's amended statement of claim charges that "the acts and doings of Leslie W. Beaven * * * were done willfully and with the malicious intent to cheat and defraud plaintiff, and with the fraudulent intent to convert the sum of \$5,000 to his own use and to the use of said Beaven Company * * *" and that "on or about December 31, 1933, he, the said Leslie W. Beaven, wrongfully, tortiously and fraudulently converted and disposed of said sum of money, [\$5,000]."

The evidence does not sustain these charges.

Beaven embarked on the enterprise with very meager capital, and plaintiff was evidently fully apprised of the fact. He took over a delapidated coal yard which had been abandoned for about three years. Improvements required by the ordinances and statutes, and other repairs, were necessary to enable Beaven to transact the business of retail coal dealer. Plaintiff must also have been fully aware of these circumstances. Shortly after he began to operate the coal yard Beaven found that it would be necessary to make certain expenditures for the improvements and repairs required, and notwithstanding the denial of plaintiff's officers that they approved the use of money realized from the sale of consigned coal for making these repairs, we are convinced that plaintiff acquiesced therein. This necessitated the extension of payments required under the contract, and notes were executed to evidence the arrears in payments which were accepted by plaintiff and later paid by Beaven. When the first contract was terminated all the coal on hand was transferred and assigned to the newly organized corporation, and Beaven's title to the property and all interest that he had in the coal yard was conveyed to the new company. Under the second contract the Beaven Company went into possession of the coal yard, with the knowledge and approval of plaintiff, and from the transactions that ensued during this period it is evident that plaintiff no longer considered Beaven personally liable. When this contract expired, the balance due thereunder was expressly assumed by the Beaven Company, and provisions were made in the third contract for payment thereof. Plaintiff's auditor supervised all expenditures made by the Beaven Company, examined its books, countersigned its checks, and was fully cognizant of its transactions with plaintiff and customers of the Beaven Company, and there is nothing in the record to indicate that either Beaven, individually, or the corporation which he organized, and which he is alleged

to have dominated and controlled, did anything to justify the summary action taken by plaintiff in the latter part of December, 1933, which culminated in the filing of involuntary bankruptcy proceedings the following month. Nor is the charge that Beaven attempted to cheat and defraud plaintiff or that he tortiously and fraudulently converted the proceeds of the sale of consigned coal to himself, sustained by the evidence.

Plaintiff's case is predicated upon the theory of the law that "where the goods are sold on consignment, and the consignee makes a sale of the consigned goods, but fails to remit the consigned price to the consignor, an action in tort may be maintained against the consignee for the price of the consigned goods," and several cases are cited to support this proposition. However, the decisions cited are not pertinent to the facts of this case. In most of these decisions, where it was claimed that a tort was committed through the conversion of money, the question turned on whether the principal was entitled to have delivered to him by the factor the specific money, notes, bills and coins which he collected. The contracts in the case at bar contained no such provision, and they cannot be construed to hold that Beaven, or the Beaven Company, were obligated to deliver the specific money received from the sale of consigned coal. The transactions between plaintiff and Beaven and later with the corporation indicate that these were running accounts, sometimes paid on the tenth of the month succeeding the sales made and sometimes extended by the acceptance of notes. If it were true that Beaven or the Beaven Company were in duty bound to turn over the proceeds of sales in specie, it is difficult to understand why books of account were kept, supervised by plaintiff's auditor, and checks countersigned by him on an account carried in a bank designated by plaintiff, or why plaintiff should have accepted notes in lieu of cash from time to time

and thus granted extensions for the time of these various payments.

In order to maintain trover for conversion of money, plaintiff must show that defendant was bound to pay over the specific money received. In Vandelle v. Rohan, 73 N. Y. Supp. 285, it was held that an action for conversion cannot be maintained against a person who receives money in a fiduciary capacity unless he is bound to return the identical money. In Larson v. Dawson, 24 R. I. 317, it was held that the question whether money can be the subject matter of an action of trover generally depends upon whether there is any obligation on the part of the defendant to deliver specific money to the plaintiff. In Taylor v. Turner, 87 Ill. 296, a suit was brought to recover proceeds from the sale of wheat by defendant, who had received the same on consignment, and the court characterized the transaction as follows (p. 302):

"It seems to us to be a simple case of the bailment of property to a factor to sell, and his refusal to pay over the proceeds of the sale to the owner of the property, and we know not why the legal remedy of an action for money had and received is not ample."

In 1 Chitty on Pleading (9th Am. Ed.) 147, par. 148, it was held to be the general rule that "to support trover the plaintiff must have the right to some identical or specific goods. Trover does not lie for money had and received generally."

Numerous other authorities cited by defendant are to the same effect. We have in this proceeding the additional facts, apparent from a reading of the various agreements, that Beaven and Beaven Company were authorized to sell coal on credit, and were not obliged to pay plaintiff until the tenth of the month following the sales, all of which indicates a running account between the parties and not any obligation to pay in specie. In the course of the trial plaintiff's counsel had marked for identification and offered in evidence photostatic copies of the schedule of unsecured debts of

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L. W. Beaven, filed in the bankruptcy proceeding, purporting to show credits claimed by Beaven from the Beaven Company and sums collected by him on accounts receivable. The exhibit was not received in evidence, and upon oral argument plaintiff's counsel again offered the document under the provisions of sec. 92, subsec. 1d, chap. 110, Civil Practice act, Illinois State Bar Stats., 1935, and has renewed his offer in writing by motion subsequently made. We think the offer was properly denied by the trial court, because the claims of the respective parties were fully heard, tried and determined in the bankruptcy proceeding. The proffered document relates to obligations and accounts between Beaven and the bankrupt's trustee, and shows nothing of the accounts between the Beaven Company and plaintiff. Neither does it distinguish between specific moneys derived from the sale of plaintiff's coal, shipped under the third contract from shipments made under the two previous agreements, nor the proceeds of sale of other materials. It certainly does not indicate that plaintiff was entitled to have delivered to it any specific money or to the immediate possession of any specific property or money in specie, and that is the factual issue upon which plaintiff's claim is predicated.

It follows from what has been said that plaintiff cannot maintain trover under the circumstances of this case and procure a judgment in tort against Beaven, individually, with a finding of malice and fraud. Beaven's obligations to the plaintiff were fully acquitted under the first contract, and under the second and third contracts there could be no conversion of money in any event. The judgment of the municipal court is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

38940

ARTHUR S. KAHN & COMPANY,
a corporation,
Appellant,

v.

MARGARET L. REDMOND and
RICHARD A. REDMOND,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

288 I.A. 624³

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Arthur S. Kahn & Company, a corporation, as plaintiff, filed its statement of claim in the municipal court alleging that it had on May 18, 1929, leased from defendants, Margaret L. and Richard A. Redmond, store premises in Chicago for a term of 25 years, commencing August 1, 1929, at the stipulated rental of \$700 a month; that pursuant to the terms of the lease plaintiff paid defendants, at the time of the execution thereof, \$8,400 to be applied as rental for the fifth year of the term, commencing August 1, 1934, and ending July 31, 1935; that August 16, 1932, defendants terminated the lease, took and still retain possession of the demised premises, and that plaintiff is entitled to the repayment of \$8,400. After defendants' motion to strike the statement of claim had been overruled, they filed an affidavit of merits, subsequently amended, admitting the execution of the lease, the supplemental agreement attached thereto, and the payment of \$8,400 by plaintiff, but averred that said sum constituted payment of rent for the fifth year of the term; that within the provisions of the lease the only contingency under which plaintiff would be entitled to repayment of said sum, would be the termination of

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the lease for any reason other than through the default of the lessee; and that since the termination resulted from the lessee's default in the payment of rent, the contingency provided for in the lease did not happen, and accordingly plaintiff never became entitled to repayment of the \$8,400. The cause was heard by the court without a jury, resulting in a finding in favor of defendants. This appeal followed.

Upon trial of the cause the execution and delivery of the lease, the supplemental agreement and the payment of \$8,400 by plaintiff to defendants were admitted, and it was stipulated between the parties that the lease was terminated by defendants August 16, 1932, for default in the payment of rent, plaintiff having prior thereto abandoned the premises and surrendered possession thereof to defendants.

The portion of the lease providing for the payment of rent reads as follows:

"In consideration of said demise, the lessee covenants and agrees with the lessors as follows:

"FIRST, To pay as rent for said premises, for said term, the sum of Two Hundred and Ten Thousand (\$210,000) dollars, * * * in monthly installments of Seven Hundred (\$700) dollars, beginning August 1, 1929, and on the first day of each and every month thereafter during said term, except that the rental for the fifth year of said term in the sum of \$8,400 has at the time of the execution of this lease been paid in advance, each in advance upon the first day of every calendar month of the term hereof, and at the same rate for fractions of a month if said term shall be terminated, as hereinafter provided, on any other day than the last day of the month, and all of said payments shall be made at the office of the lessors, Chicago, or at such other place in Chicago as the lessors shall from time to time, by written notice left at said premises, appoint."

Other paragraphs of the lease provided that if the lessee should abandon or vacate the premises, lessors had the option of terminating the lease, taking immediate possession, subletting the premises in whole or in part to one or more tenants at the highest rental obtainable, and holding the lessee accountable for the difference between the rent stipulated in the lease and the amount paid by the

new tenant or tenants; or that in case of default by lessee, lessors should have the alternative option of at once terminating the lease and taking possession of the premises or re-entering into possession without declaring a forfeiture and holding the lessee to account under the covenants of the lease.

The stipulated facts disclose that upon plaintiff's default and abandonment of the premises defendants elected to exercise the option of terminating the lease, and they re-entered into possession August 16, 1932. Under these circumstances, and in the absence of any provision in the lease for continuing the liability of the lessee in case of termination, the law is well settled that plaintiff thereafter became absolved from any further liability to pay rent. (Grommes v. St. Paul Trust Co., 147 Ill. 634; Sutton v. Goodman, 194 Mass. 389; Johannes v. Kielgast, 27 Ill. App. 576, and 16 Ruling Case Law, 1137, par. 658.)

It is plaintiff's contention that the \$8,400 paid to defendants, upon execution of the lease, was intended for and constituted a deposit to secure the payment of rent, and that since all liability for the payment of rent ceased upon termination of the lease, plaintiff is entitled to recover the sum so deposited. Defendants filed no brief on this appeal, but plaintiff's counsel say that it was defendants' contention upon trial of the cause that said sum did not constitute a deposit but rather an advance payment of rent for the fifth year of the term, which could be recovered by plaintiff only if the lease were terminated for any reason other than lessee's default prior to August 11, 1934, and that since the lease was terminated on account of lessee's default, plaintiff cannot recover the sum paid.

From an examination of the lease and rider attached thereto, it appears that three references are made to the \$8,400 payment. One

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part of the lease contains the following provision:

"Except that the rental for the fifth year of said term in the sum of \$8,400 has at the time of the execution of this lease been paid in advance." (*Italics ours.*)

The typewritten rider attached to the lease provides:

"The lessee has this day paid to the lessors the sum of \$8,400, receipt of which is hereby acknowledged by the lessors, in payment of the rent for the year commencing August 1, 1934, and ending July 31, 1935." (*Italics ours.*)

In another portion of the rider appears the following:

"It is expressly understood and agreed that in case this lease shall be terminated for any reason other than the default of the lessee, prior to August 31, 1934, then and in such event the sum of \$8,400 this day deposited with the lessors shall be returned to the lessee; and in case this lease shall be terminated for any reason other than the default of the lessee during the year commencing August 1, 1934, and ending July 31, 1935, then the unused portion of said rent at the time of said termination shall be immediately returned to the lessee."

In rendering judgment for defendants the trial court was of the opinion that these three references to the payment of \$8,400 were not ambiguous and construed them to be payments of rent in advance which could not be recovered by plaintiff because the lease was terminated through its default. Nevertheless, the court admitted evidence, over plaintiff's objection, tending to show that when the parties were negotiating for a lease, and before the document was executed, plaintiff insisted on certain repairs and improvements aggregating \$6,000 or \$7,000, and also that defendants pay a broker's commission of \$2,500, and that because of defendants' inability to lay out these sums plaintiff advanced the \$8,400 in question. We think it was error to admit this extrinsic evidence. If there is any ambiguity in the three provisions of the lease and rider, hereinbefore quoted, it is patent upon the face of the instruments, and parol evidence is inadmissible to explain it. It was so held in Rees v. Johnson, 191 Ill. App. 182, where the court laid down the rule as follows (p. 184):

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"It is a legal maxim that 'a patent ambiguity cannot be cleared up by extrinsic evidence.'" Citing 2 Cyc. 278 and Ranton v. Tefft, 22 Ill. 367.

Moreover, the testimony of Richard A. Redmond, one of the defendants, relating to the negotiations preceding the execution of the lease, was clearly an attempt to modify or vary the terms of the written lease. This cannot be done. (Lanum v. Harrington, 267 Ill. 57; Rector v. Hartford Deposit Co., 190 Ill. 380; Hoefeld v. Ozello, 213 Ill. App. 152.)

Plaintiff's counsel assign a third reason why the testimony should not have been received, namely, the failure of defendants in their affidavit of merits to make any averments with reference to improvements or of any conversations tending to establish an agreement or understanding as to the use of the \$8,400 paid by plaintiff. Reddig v. Looney, 208 Ill. App. 413, is cited, holding that defendants are "confined to the defense set up in their affidavit of merits." It follows, therefore, that the rights of the parties to the sum in question must be determined from the provisions of the lease and rider, and this involves a legal construction of the documents under the uncontroverted facts of the case.

Plaintiff's counsel say that upon trial defendants relied on the case of Galbraith v. Wood, 124 Minn. 210, wherein George R. Kibbe entered into negotiations with defendants for a lease of the West hotel in Minneapolis, and submitted a proposal in writing offering to take a lease for a term of fifteen years from September 1, 1911, "upon the terms and conditions hereinafter stated, and in the form of the lease hereto attached and made a part hereof." After specifying that defendants were to expend for alterations and repairs not less than \$100,000, nor more than \$150,000, and that Kibbe was to pay as rental the sum of \$40,000 for the first year, with a graduated scale during subsequent years, Kibbe made the following proposal:

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"At the time of the execution of said lease I will pay you the sum of \$20,000 as an advance payment on rent, which advance I will keep good during the first five years of said lease, with privilege of reducing at the rate of \$666.66 per year for the third, fourth and fifth year of said term."

Defendants accepted the proposition. The lease dated September 1, 1911, was executed September 28, 1911, and on the following day Kibbe paid defendants \$20,000 and obtained the following receipt:

"Received of George R. Kibbe \$20,000 as advance payment of rent of West Hotel according to proposal for lease of West Hotel, Dated August 31, 1911."

Kibbe took possession September 1, 1911, made monthly payments to and including February, 1912, and remained in possession until March 12, 1912, when involuntary bankruptcy proceedings were filed against him, and plaintiff in that suit was appointed receiver and afterward trustee in bankruptcy. Shortly thereafter defendants served notice upon Kibbe and his trustee that the lease was terminated because Kibbe had been adjudged bankrupt, and possession was surrendered to defendants. Thereafter plaintiff instituted suit to recover the \$20,000, and his complaint alleged that said sum was paid by Kibbe to defendants "as an advance payment of rent;" that Kibbe had kept this advance payment good at all times, and when defendants declared the lease terminated and re-entered the premises they had in their possession the "advance payment" of \$20,000, and that there then became due to Kibbe and plaintiff as his trustee in bankruptcy that sum of money. Notwithstanding that plaintiff in his own pleading had designated the sum as "advance payment" of rent, the Minnesota court held that plaintiff could not recover. However, the provisions of the lease in the Galbraith case were materially different from those in the lease at bar, in so far as the question of the termination of the lease is concerned. In the Galbraith case the instrument provided that upon termination, the

right of the lessor to collect rents should not in any way be affected, whereas in the lease here in question no right is reserved to the lessors to collect rent after the termination thereof. Although under paragraph six of the lease at bar lessors had the option, in case the lessee should abandon or vacate the premises "without terminating this lease" to take immediate possession, relet the premises and look to the lessee to satisfy any deficiency, but, as appears from the stipulation of the parties, they terminated the lease and therefore had no further right to collect rents from plaintiff.

Plaintiff cites various decisions in this and other states dealing with analogous situations. In Virginia Amusement Co. v. Mid-City Trust & Savings Bank, 220 Ill. App. 147, although the payment made by the lessee to the lessor was clearly designated as rent, and not as a deposit, the court nevertheless held, as a matter of law, that the lessor could not retain the sum deposited upon terminating the lease, except only so much thereof as was necessary to satisfy the actually accrued rent.

In Johnson v. Englestein, 236 Ill. App. 215, it appeared from the amended statement of claim that at the time the lease was executed the lessee paid the lessors \$2,500 to be applied in payment of rent which would accrue in case the lessee remained in possession during the last ten weeks of the term. The lease having been terminated prior to that time, the court held that the \$2,500 could not be applied to the payment of rent for the last ten weeks, and that while there was no express provision that the sum should be refunded in case the lease was terminated before the commencement of the last ten week period, and said that -

"under the authorities, * * * the \$2,500 was given to the lessors as a deposit to secure the faithful performance of the terms of the lease by the lessee, * * * to be applied to the payment of the rent for the last ten weeks of the term in case the lease was

not terminated prior to February 17, 1924, and since the lease was terminated prior to that time, the \$2,500 must be refunded, less whatever sum, if any, is due and owing to the lessors for rent or any other damages sustained by them on account of lessee's failure to carry out his contract."

Cunningham v. Stokon, 81 Kans. 780, is closely analogous to the case at bar. There the lease provided that the lessee should pay as rent for the premises demised \$21,000, of which \$4,200 was to be paid on July 1, 1905, and applied upon the discharge of the last, or fifth, year's rent, and the balance should be paid in equal monthly installments of \$350 each. Lessor undertook to erect and furnish a theater. \$4,200 was paid before the erection of the building was commenced, and after obtaining possession the lessee defaulted, by reason of which the lessors re-entered into possession of the building. The lessee was then in arrears for five months' rent, aggregating \$1,750, and instituted suit for the sum of \$2,450, being the amount of the deposit less the accrued rent. Judgment was entered in favor of the lessee and affirmed by the Kansas Supreme court, which held (pp. 786-787):

"The lease did not contain an express statement that the money advanced should constitute a deposit to insure performance by appellee, but the advancement of so large an amount, the payment of the same before the construction of the building was begun, and about six months before possession could be obtained, and the provision that the amount advanced should be applied on the rental for the last year of the term, clearly indicate that it was a deposit to insure performance by appellee. Now the lease did not provide that a failure to pay rent when due should forfeit the cash deposit, nor that it should be forfeited for any reason. Under the statute, if a tenant neglects to pay rent for a certain period the landlord may terminate the lease by giving a certain number of days' notice in writing, unless the rent is paid before the term expires. * * * Cunningham, being in default as to rent, appellants had the right to terminate the lease; but there is nothing in the agreement or the statute which would warrant us in treating the \$4,200 deposit as liquidated damages, or justify the forfeiture of the same for nonpayment of rent. According to the theory of appellants, the default of a tenant in the payment of rent for a week, or even a day, would warrant them in taking possession of the property and appropriating to themselves the \$4,200 of indemnity which the tenant advanced."

Under the provisions of the lease in the case at bar, defendants had the right to re-enter the premises without terminating

the lease and apply the moneys in their hands on account of accruing rents. However, they did not exercise the option afforded them, but terminated the lease and regained possession of the demised premises, which they had a right to do. There is no evidence that defendants sustained any damage by reason of the termination, nor is there any claim that they were damaged. Therefore, under the authorities hereinbefore cited, which in our opinion enunciate the principle applicable to a situation of this kind, they should not be permitted to avail themselves of the rights, both to terminate the lease and to collect rent subsequently accruing thereunder. It appears to us from all the circumstances of the case and the provisions of the lease that the \$8,400 was deposited as security for rent, and the lease having been terminated before the rental for the period designated accrued, the money should have been returned to the lessee. The judgment of the municipal court is reversed; there being no controverted facts in issue, judgment is entered here for plaintiff and against defendants for \$8,400, with interest from August 16, 1932, the date on which defendants elected to terminate the lease and on which date they became liable for repayment of that sum.

JUDGMENT REVERSED AND JUDGMENT
HERE FOR \$8,400.

Sullivan, P. J., and Scanlan, J., concur.

39198

EMILY MAGNUSON,
Appellee,

v.

DELLA JECHORT,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

288 I.A. 624⁴

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Emily Magnuson, as plaintiff, filed a joint action of forcible detainer for possession and rent for an apartment in the building at 8854 Dante avenue, Chicago. Upon a hearing, the claim for rent was withdrawn and judgment for possession was rendered in favor of plaintiff. Defendant appeals.

The salient facts, as to which there is substantially no dispute, disclose that October 23, 1928, Joseph W. O'Connor executed an agreement with John Jechort, Jr., and Della Jechort, his wife, for the sale by installment payments of the three-apartment building at 8854 Dante avenue, Chicago, for \$26,700. The Jechorts entered into possession of the premises and on August 26, 1932, executed an assignment of the rents to Edward A. Lyden, then owner of the property, reserving to themselves possession of apartment No. 2, which they occupied. In 1933 the Jechorts applied to the Home Owners' Loan Corporation for a loan upon the property, which was rejected. December 15, 1934, Elsa Klarine, who then held title, filed a forcible detainer action against the Jechorts in the municipal court to recover possession of the three-apartment building. Jechorts were served

with summons and on trial had on January 25, 1935, the court found them guilty of withholding the premises, and entered judgment in favor of Elsa Klarine for possession thereof. The following month Della Jechort paid \$30 to the agent of the then owner of the property for apartment No. 2, and continued to pay the same amount as rental for the apartment, which she occupied until the month of November, 1935. By reason of her failure to pay rent for December, 1935, and January, February, March and April, 1936, Emily Magnuson, plaintiff herein, who had previously obtained title to the property, served notice on Della Jechort, the defendant, claiming rent of \$150, and April 20, 1936, she filed the forcible detainer action which is the subject matter of this controversy.

At the commencement of the trial defendant's counsel moved to quash the summons and dismiss the suit on the ground that the court was without jurisdiction of the subject matter, because the complaint failed to allege under which of the six clauses of sec. 2 of the Forcible Entry and Detainer act (Illinois State Bar Stats., 1935, chap. 57) plaintiff was proceeding, and this is urged as the first ground for reversal. The proceeding of forcible entry and detainer is statutory and the decisions interpreting the statute consistently hold that the statute does not require the complaint to set forth the circumstances under which the defendant entered but simply that he is in possession and unlawfully withholds the premises, and on trial the plaintiff may prove his right to recover under any clause of sec. 2 of the statute. Section 5 of the statute provides:

"On complaint in writing by the party * * * entitled to the possession of such premises being filed in any court of record, * * * stating that such party is entitled to the possession of such premises * * *, and that the defendant * * * unlawfully withholds the possession from him * * *, the clerk of such court shall issue a summons * * *."

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The complaint in this cause alleged the essential requirements of the statute (1) that plaintiff was entitled to possession, and (2) that defendant unlawfully withheld possession thereof from plaintiff.

In the early case of Martens v. Fields, 17 Ill. App. 483, an action of forcible entry and detainer was instituted by filing a complaint which merely alleged that Martens was entitled to the possession of the premises described in the complaint and that Henry Fields and another were unlawfully withholding possession thereof from him. Summons issued and was served on defendants, who demurred to the complaint. The court sustained the demurrer and entered judgment for costs against plaintiff. On appeal the judgment was reversed and the cause remanded, the court holding (p. 484):

"The proceeding is statutory, and it is safe to follow the form prescribed, under which any of the statutory grounds of recovery may be proved. This complaint contains all the statute required. The court erred in sustaining the demurrer."

In Harms v. Stier, 70 Ill. App. 213, a forcible entry and detainer action was instituted under sec. 5, chap. 57 of the revised statutes. It was there held that in such an action the statute does not require the complaint to state the circumstances under which the defendant entered, but simply that he unlawfully withholds possession, and that on trial plaintiff may prove his right to recovery under any clause of sec. 2. These decisions have been followed (Woodbury v. Ryel, 128 Ill. App. 459, 461) and defendant cites no cases to the contrary.

As a remaining ground for reversal defendant argues that the court had no jurisdiction of the subject matter, because an affidavit filed in support of her motion to dismiss tended to show that she was entitled to possession by virtue of an uncan-

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celled contract of purchase. While it was altogether proper for defendant to interpose the subject matter of the affidavit by way of defense, the averments thereof did not in any way affect the jurisdiction of the court so as to justify a dismissal of the case, and it would have been error for the court to have done so. Defendant's affidavit in support of her motion to dismiss the complaint averred substantially the facts hereinbefore set forth relating to the contract of purchase and the subsequent transfers of title. Upon the hearing she introduced the written contract for a warrenty deed, dated October 23, 1928, between O'Connor and the Jechorts, wherein the grantor agreed to convey the property in question, improved by a three-apartment building, conditioned upon certain installment payments to be made by the grantees. From an indorsement on the contract it appears that John Jechort, Jr.'s interest was, on February 3, 1932, assigned to defendant. Evidence adduced by plaintiff discloses that December 15, 1934, one Elsa Klarine filed a forcible detainer action in the municipal court against defendant and her husband for possession of the premises described in the contract of purchase. Trial was had by the court without a jury, and, as previously stated, defendants were found to be unlawfully withholding the premises and judgment for possession was entered against them.

Defendant argues that this was not an adjudication of her right to possession under the contract because (1) the court had no jurisdiction under sec. 2 of the act (this contention is also made in the instant proceeding and in view of the conclusion hereinbefore reached requires no further discussion), and (2) because in the Klarine case the parties are not the same as in the case at bar, identity of parties being an essential element to constitute

res adjudicata. Plaintiff's reply to this second contention is that the former proceeding is shown, not to prove res adjudicata but by way of estoppel by verdict, and we think the distinction is well taken. While identity of parties is essential to a plea of res adjudicata, only identity of the subject matter is required to prove estoppel by verdict. It was held in Chicago Title & Trust Co. v. National Storage Co., 260 Ill. 485, and City of Chicago v. Partridge, 248 Ill. 442, that where an adjudication is relied on as determining some controlling fact or matter arising in a subsequent action, it is indispensable that such fact be involved in the determination of the issues between the same parties, or their privies, in both actions. It was held in the Klarine case that plaintiff was entitled to possession of the premises. Subsequently, Elsa Klarine conveyed title to the property to Emily Magnuson, plaintiff herein, who became privy to the rights of Elsa Klarine, and under the holding in the Partridge case, supra, the judgment in the Klarine case was a determination of defendant's rights to possession and may be set up as an estoppel by verdict of defendant's rights in this proceeding. It follows that subsequent to the entry of judgment against her in the Klarine case, defendant became a mere tenant and she evidently regarded herself as such by paying rent for five months. When she ceased to make those payments, plaintiff herein, who had acquired title to the property, was entitled, as landlord, to regain possession.

We find no convincing reasons for reversal of the judgment of the municipal court and it is affirmed.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

39253

A. L. SCHIFF,
Appellee,

v.

J. A. PECK and KATIE PECK,
jointly and severally,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

288 I.A. 625¹

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This appeal presents for consideration the question whether tenants may abandon an apartment occupied by them under a written lease without the payment of rent, on the ground that the presence of bedbugs in large numbers rendered the premises uninhabitable and thus furnished the basis for a constructive eviction.

A. L. Schiff was the owner of a six-apartment building at 6640 Parnell avenue, Chicago. September 1, 1933, he leased a four-room apartment on the third floor of the building to J. A. Peck and Katie Peck for two years ending August 31, 1935, at the stipulated rental of \$35 a month. The Pecks occupied the demised premises and regularly paid rental therefor until July 31, 1935, when they abandoned the apartment, as they claim, because the influx of bedbugs in large numbers from other parts of the building rendered it uninhabitable. Thereafter, August 15, 1935, plaintiff procured a judgment by confession in the sum of \$47.75, representing rental for August, 1935, costs and attorney's fees. Thereafter defendants moved to vacate the judgment and had leave to appear and defend. By stipulation of the parties, trial was had by a jury of five, resulting in a verdict finding the issues against plaintiff. Thereupon plaintiff moved for a judgment non obstante veredicto, which

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motion was sustained by the court. The amount of the judgment by confession was reduced from \$47.75 to \$36.67, and judgment entered in the latter sum for plaintiff. This appeal followed.

Defendants' petition to vacate the judgment which was allowed to stand as their affidavit of merits, alleged in substance that prior to the expiration of the lease defendants discovered in the rooms, halls, floors and walls of their apartment, and in the beds and upon their clothing,

"certain vermin, commonly known as bedbugs; that bedbugs were found in other parts of the building and particularly in the second apartment, directly beneath that of the defendants; before the bedbugs entered the apartment of the defendants; that the presence of these bugs was immediately brought to the attention of the landlord, who, after the lapse of about two weeks, made some attempt by the use of kerosene to exterminate the bugs;" but without success, and instead the bugs "continued to grow worse and grow in number so that it became necessary for the defendants to spend about \$40 to have the bugs exterminated and also report the matter to the health department of the city of Chicago; that the bugs were never eradicated, so that by the last of July, 1935, the apartment was so infested that it became uninhabitable and the defendants were compelled to move."

There is abundant evidence in the record to sustain the contention that the building was infested with bedbugs, and that notwithstanding the ordinary efforts made by Mrs. Peck to exterminate them in her own apartment, they entered from the apartment below and other parts of the building, through the walls and floors, to such an extent that the Peck premises became extremely offensive, uncomfortable and rendered unfit for occupancy. The landlord was notified of this condition and attempted to exterminate the bugs by spraying kerosene throughout the building, but without results. The Pecks notified the board of health of the city of Chicago, and notice was served on plaintiff to exterminate the vermin, but nothing further was done. Defendants testified that the bugs crawled around on the floor in the various rooms, on the ceilings, and were present in the bed and closets and on their clothes, and that they could no longer

remain in the apartment with comfort.

Our courts have held that a constructive eviction may take place, even though there be no actual physical expulsion, where acts of a grave and permanent character, amounting to a clear indication of intention on the part of the landlord, are committed, so as to deprive the tenant of the enjoyment of the demised premises. (Kensy v. Zimmerman, 329 Ill. 75, citing Gibbons v. Hoefeld, 299 Ill. 455, and Keating v. Springer, 146 Ill. 481, where it was said (in the Keating case, supra), that

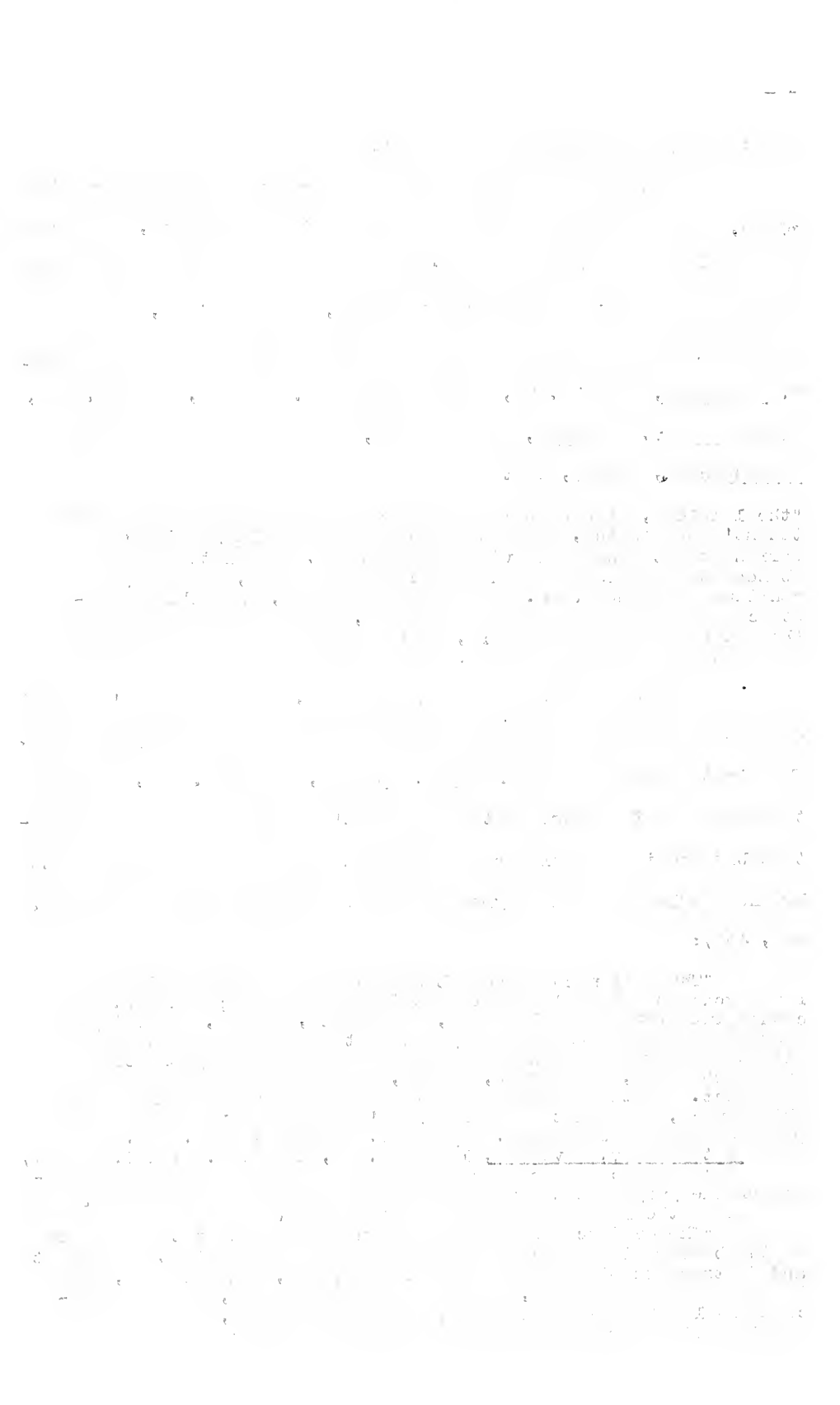
"the landlord, without being guilty of actual disturbance of the tenant's possession, may yet do such acts as will justify or warrant the tenant in leaving the premises. The latter may abandon the premises in consequence of such acts, or he may continue to occupy them. If he abandons them, then the circumstances which justify such abandonment, taken in connection with the act of abandonment itself, will support a plea of eviction as against an action for rent."

We find no bedbug cases in Illinois, but defendants' counsel cites two authorities in sister states which are precisely in point. The first of these is Delamater v. Foreman, 184 Minn. 428, wherein the presence of bedbugs in the defendant's apartment rendered it untenable and it was held to be a valid defense in an action brought by the landlord for the payment of rent. The court there said (pp. 429, 430):

"There is much in and about such an apartment building far beyond the control of a tenant in one of the apartments. He cannot interfere with the walls, partitions, floors, and ceilings wherein the verminous enemy may propagate; nor can he interfere with the cracks and openings affording an opportunity of access from such walls, partitions, floors, and ceilings into the apartment. If the attack is sufficiently serious and comes from this source, it violates the landlord's implied covenant that the premises will be habitable. (Smith v. Marrable, 11 M. & W. 5; * * * Batterman v. Levenson, 102 Misc. 92, 168 N. Y. S. 197; * * *.)

"We are of the opinion that the evidence supports the finding of the jury that the vermin came from a source within the jurisdiction of the landlord under the rule stated.

"The evidence is also sufficient to show that the presence of the bedbugs in such large numbers caused the greatest discomfort and distress to plaintiff and his family; and, since it was, under the findings of the jury, due to defendants' fault, it was sufficient in law to constitute a constructive eviction, and plaintiff was justified in vacating the premises as he did."



In Streep v. Simpson, 80 Misc. N. Y. 666 (141 N. Y. Supp. 863), the tenant vacated the premises one month before the expiration of his lease, and when sued for rent defended on the ground "that the presence of bedbugs caused discomfort and distress and rendered the premises untenable as living quarters." There, too, it appears that the landlord had made attempts to exterminate the bugs, without success, and that the bugs came from the apartment below defendant's. The court held (p. 668):

"An intolerable condition which the defendant neither causes nor can remedy seems to me warrants the application of the doctrine of constructive eviction. The rule in Jacobs v. Morand, 59 Misc. (N. Y.) 200, in regard to bugs and ants within the apartments, which can be dealt with by the tenant by processes known to all housewives, should not be extended to cover offensive and unbearable nuisances outside of the apartment. This tenant could not pull down the walls of the ceilings. He and his family ought not to be compelled to pay rent for an apartment in which they could not live."

The law is well settled that evidence cannot be considered in passing upon the question of the legal propriety of entering a judgment non obstante veredicto. Such a judgment "will not be rendered where there is substantially a material issue or a good defense, * * *" but only in cases where it is clear that the defendant has no meritorious defense under whatever form his plea may be interposed. Where there is a conflict in the testimony, in actions at law, it is for the jury to weigh and determine the evidence admitted by the court as competent, and a trial court has no power, when a jury is not waived, to determine the weight and preponderance of conflicting evidence introduced to establish or disprove the facts. To do so would be an invasion of a defendant's constitutional rights to have the facts passed on by a jury. (Mirich v. Forscher Contracting Co., 312 Ill. 343, 356.) In passing upon a motion for judgment non obstante veredicto under the new civil practice act, the trial court has no more authority to weigh and determine controverted questions of fact than under the practice act of 1907. (Illinois Tuberculosis Sanitarium v.

Springfield Marine Bank, 282 Ill. App. 14.)

Subsection 3c of sec. 68 of the Civil Practice act
(Illinois State Bar Stats., 1935, chap. 110) provides that

"if the party in whose favor the verdict of the jury was rendered shall assign error in the Appellate or Supreme court upon the order of the trial court entering judgment notwithstanding the verdict, and the Appellate or Supreme Court shall be of opinion that the trial court committed error in ordering or entering judgment notwithstanding the verdict, such court shall reverse such order and judgment and shall order or enter judgment in accordance with the verdict of the jury, unless it shall appear that there was error in the case that would have entitled the party in whose favor judgment notwithstanding the verdict was entered, to a new trial if such judgment had not been entered by the trial court, in which case a new trial shall be ordered."

A case in point construing this provision of the statute is McNeill v. Harrison & Sons, 286 Ill. App. 120. A careful examination of the record fails to disclose that there was any such error in the case as to have entitled plaintiff to a new trial, and, in fact, no such motion was made by plaintiff. The cause was fairly tried and the jury were fully justified in finding from the evidence that defendants' apartment became uninhabitable. Under the circumstances, it was error for the court to enter judgment non obstante veredicto, and it is therefore reversed and the cause remanded with directions to enter judgment on the verdict of the jury.

REVERSED AND REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Scanlan, J., concur.

38390

ELI MESTCOFF, as Receiver of
ROSENWALD & WEIL, a corporation,
Appellee,

v.

THE FIRST NATIONAL BANK OF
CHICAGO et al.,
Defendants.

THE FIRST NATIONAL BANK OF
CHICAGO,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

288 I.A. 625²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The first National Bank of Chicago, appellant, appeals from a decree for \$48,341.98 rendered against it. Complainant, receiver of Rosenwald & Weil, a corporation, appointed at the instance of a judgment creditor of the corporation, filed his bill against The First National Bank of Chicago, J. Capps & Son, a corporation, and Harry S. Kipfer, Max J. Heep, John H. Vogwill, Sam Schackman, Leon F. Oppenheimer (Ottenheimer) and Edward S. Weil, as officers and directors of Rosenwald & Weil.

The bill contains two principal charges: (1) That the officers and directors of Rosenwald & Weil conspired to defraud its creditors by pledging all of its merchandise to the defendant bank, thus preferring the bank's debt to the claims of holders of bonds secured by real estate formerly owned by it; that the pledge was made in violation of a provision of the charter of Rosenwald & Weil requiring the consent of two-thirds in amount of the holders of preferred stock to any mortgage or the creation of any lien on its assets, and was, therefore, invalid. (2) That

the same officers and directors fraudulently assigned the leasehold of the place of business of Rosenwald & Weil to J. Capps & Son, a corporation, defendant, and fraudulently entered into an agreement with it for the sale by it of the merchandise of Rosenwald & Weil on a commission basis, and pursuant to the agreement said officers and directors turned over to J. Capps & Son the customers' lists of Rosenwald & Weil and diverted profits from the latter corporation for which they and J. Capps & Son should account. As the decree dismissed the cause as to J. Capps & Son it is only necessary for us to consider charge (1). The cause was referred to a master in chancery, who heard all of the evidence. At that point in the hearing the term of office of the master expired, but by stipulation he was appointed a special commissioner and ordered to file his report of the testimony together with his conclusions of law and fact. His report found that the allegations of the bill were not sustained by the evidence and recommended that the bill be dismissed for want of equity. Complainant's exceptions to the report were sustained by the chancellor, and a decree was entered finding that the pledge of merchandise to the Bank was fraudulent and void and ordering that complainant recover from defendant The First National Bank of Chicago the sum of \$48,341.98 and that the said officers and directors of Rosenwald & Weil render an account of all moneys received by them as commissions or otherwise from January 20, 1931, to the date of the appointment of complainant as receiver, "and that the court retain jurisdiction of the subject matter until the coming in of said account for the further disposition of the matter as to such defendants, and that said account be filed within thirty days from date hereof. It is further ordered that the proceedings be dismissed as to the defendant, J. Capps & Sons."

The theory of appellant is "that the pledge in question was

made in good faith upon a valuable consideration, viz., the extension of an admittedly valid indebtedness of \$215,000, which was then due, and the advancement by the bank of \$10,000 of additional funds; that at the time of the pledge Rosenwald & Weil was not indebted to any trade creditor, and its books did not show the existence of any obligation to bondholders because, in 1927, it had conveyed the premises securing said bonds to a purchaser, who had assumed their payment, and had in fact made all payments due thereon until January, 1931; that the bank did not know of the liability of Rosenwald & Weil on these bonds at the time it accepted the pledge and extended additional credit; that there is no evidence of any intent on the part of anyone to defraud creditors and that, at most, the pledge was a preference which could only be avoided, if at all, in bankruptcy within the four months' period prescribed in the Bankruptcy Act; * * * that the pledge cannot be attacked, as beyond the limitation of the charter of Rosenwald & Weil, because it was given to secure a loan made in the regular course of business, and was afterward ratified by the preferred stockholders; and that in any event, the charter provision was intended solely for the protection of stockholders, and its transgression could not be challenged by the complainant; * * * that the amount of damages awarded against it cannot be reconciled with any possible theory of the evidence."

The following are the material findings of the special commissioner:

"I find from the evidence that Rosenwald & Weil, Inc. carried its account with First National Bank of Chicago for a number of years prior to the incidents complained of by the Complainant herein. No proof was offered as to the exact date when banking relations were first established between Rosenwald & Weil, Inc. and the defendant First National Bank of Chicago.

"The testimony shows an indebtedness of Rosenwald & Weil created in December, 1923, aggregating \$300,000.00, of which there was owing \$175,000 to the First National Bank of Chicago, \$75,000.00 to the National Park Bank of New York, and \$50,000.00 to the Noel State Bank of Chicago. The collateral to secure the entire indebtedness to the above three banks was held by the First National Bank

of Chicago, and this collateral consisted of assigned accounts receivable. In the month of December, 1929, the indebtedness above referred to was paid in full through collection of the collateral so deposited as security.

"In January, 1929, another loan was made by the First National Bank of Chicago, to Rosenwald & Weil, Inc., and on April 15, 1931, an additional \$10,000.00 of new money was loaned by the First National Bank of Chicago. The loans last above referred to were made in regular course of business and the proceeds of such loans were used by Rosenwald & Weil, Inc. in due course of business.

"In addition to the \$10,000.00 loan so made on April 15, 1931, and at that time, a note for \$215,000.00 was also executed by Rosenwald & Weil, Inc. in favor of the defendant, First National Bank of Chicago, said last mentioned sum being new indebtedness incurred by Rosenwald & Weil, Inc. commencing in January, 1929, and continuing in increased amounts to April 15, 1931, - the note for \$215,000.00 so last above referred to consolidating into one note various smaller notes representing moneys loaned from time to time prior to April 15, 1931. The two notes for \$10,000.00 and \$215,000.00 respectively were produced before the Master, and photostatic copies thereof were offered in evidence and are herewith returned as Complainant's Exhibits No. 6 and 8. Photostatic copies were also offered in evidence as Exhibits No. 4, 5 and 7, such being notes given to represent current indebtedness of Rosenwald & Weil, Inc. to the First National Bank of Chicago. The total indebtedness on said notes at the time of the hearing before the Master aggregated \$113,112.61, consisting of \$10,000.00 evidenced by Exhibit No. 4; \$7500.00 evidenced by Exhibit No. 5; \$10,000.00 evidenced by Exhibit No. 6; \$5000.00 evidenced by Exhibit No. 7 and \$80,612.61 evidenced by Exhibit No. 8.

"At the time the \$10,000.00 loan was obtained on April 15, 1931, there was pledged with the defendant First National Bank of Chicago as security therefor certain raw and unfinished merchandise.

"The resolution of the Board of Directors of Rosenwald & Weil, Inc. passed for the purpose of obtaining such loan, authorizes the pledging of said assets for security in addition to the assigned accounts theretofore held to secure prior indebtedness. The testimony bears out the resolution of the Board of Directors of Rosenwald & Weil, Inc. to the effect that the merchandise in question was the only asset pledged at that time.

"All the collateral, including the raw and unfinished merchandise pledged as above set forth, given to the First National Bank of Chicago By Rosenwald & Weil, Inc. to secure its indebtedness, was liquidated in due course of business with the exception of a face value amount of \$36,234.49, consisting of: Junior mortgages, \$14,204.66; Sundry notes \$11,361.43 and assigned accounts, \$10,268.40. Said last mentioned items were held by defendant, First National Bank of Chicago on the date of the hearing before the Master, to secure the balance due said bank of \$113,112.61.

"The testimony further shows that Rosenwald & Weil, Inc. had only one account with the defendant, First National Bank of Chicago, at the time of the aforesaid transactions, and such account was represented by the signature card introduced in evidence as Defendant First National Bank of Chicago's Exhibit No. 3.

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[illegible]

This card shows that the account was closed on April 8, 1932, and such documentary evidence confirms the testimony of Harry S. Kipfer as to the date of the closing of such account.

"The assigned accounts of the defendant Rosenwald & Weil, Inc. held by the defendant, First National Bank of Chicago, at the date of the passing of the resolution of the Board of Directors of Rosenwald & Weil, Inc. upon which complainant relies, were handled by the bank on a revolving collateral basis in accordance with the usual custom. Such procedure consists of an interior bank account over which the bank has sole control, and is used primarily for segregation of funds arising out of the collection of accounts held as collateral. Collections on assigned collateral made by Rosenwald & Weil, Inc. were turned over to the defendant, First National Bank of Chicago, and were placed in this account called 'Rosenwald & Weil Collateral Account.' Transfers from this account were made only on instruction of the officer of the bank in charge of the account. Money was transferred therefrom for but two purposes: (1) To apply on the loan, and (2) To substitute for new accounts receivable in order that the company might have working funds. Both of such transfers were made only by the bank in its sole discretion. The practice of the bank in relation to the so-called 'revolving assigned account collateral arrangements,' was that so long as a debtor was in good standing substitutions were generally allowed at the request of the debtor, because the debtor was familiar with its own requirements. The whole procedure was, however, optional with the bank. The witness Kipfer, former President of Rosenwald & Weil, Inc., testifying as Complainant's witness, among other things testified that where money was collected by Rosenwald & Weil, Inc. on the assigned accounts it was immediately turned over to the defendant First National Bank of Chicago, and that Rosenwald & Weil, Inc. did not get any of the funds represented by the assigned accounts.

"It further appears from the evidence that during the period of these loans, so far as was known to the First National Bank of Chicago, the only other creditors of Rosenwald & Weil, Inc. were trade creditors, of whom there were but few, due to the fact that practically all bills payable were discounted. The witness Kipfer further testified that in 1931 Rosenwald & Weil, Inc. had no creditors except the bank, and that this fact was shown on the company's statements. It was further testified by the witness Kipfer that such bond issue liability was not included in Rosenwald & Weil, Inc. financial statements.

"The witness Kipfer further testified that in 1927 or thereabouts, and before incurring any of the present bank indebtedness, Rosenwald & Weil, Inc. sold the premises securing the bond issue to the White Bookhouse, and thereafter the said premises were not carried on the books of Rosenwald & Weil, Inc. as an asset, nor was the bond issue carried as a liability. He further testified that at such time Rosenwald & Weil, Inc. had no creditors other than the bondholders.

"Counsel for complainant admitted into the record that Greenebaum Sons Investment Company, the house of issue of the bond issue, knew about the transfer of the title to the White Bookhouse, and that Greenebaum Sons Investment Company, Trustee, was the trustee named in the bond issue last above referred to.

"Counsel for complainant attempted to bring home notice of

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the bond issue to the defendant First National Bank of Chicago through and by means of checks produced purporting to be part of the proceeds of the bond issue loan. It appears, however, from the testimony that the checks in question were placed in the general checking account of Rosenwald & Weil, Inc. in the First National Bank of Chicago, and no notice other than such as might be inferred from the deposit of such checks in the general checking account of Rosenwald & Weil, Inc. was brought home to the defendant, First National Bank of Chicago.

"According to the testimony, the current indebtedness to defendant, First National Bank of Chicago, was incurred in January, 1929, and there is no showing that any collateral held by the bank was pledged after September 24, 1929, with the exception of merchandise, inclusive of both raw and finished products.

"No testimony was offered tending to show that the loans here in question were not made, and collateral pledged, other than in the regular and current course of business.

"The defendant, First National Bank of Chicago, produced as a witness, Thomas J. Butler, an Assistant Cashier of the First National Bank of Chicago, who testified as to the identity of the signature of Lessing Rosenwald appended to defendant First National Bank of Chicago Exhibit No. 1, and thereupon counsel for the defendant First National Bank of Chicago further offered in evidence certified copy of letters testamentary issued in the Estate of Julius Rosenwald, deceased, wherein Lessing Rosenwald and Merion R. Stern were named Executors.

"The witness Butler further identified the signature card of Rosenwald & Weil, Inc. on file in the First National Bank of Chicago, and identified the outstanding and unpaid notes evidencing the indebtedness due said bank from Rosenwald & Weil, Inc.

"Among the documents so identified by the witness Butler, and offered in evidence on behalf of the defendant First National Bank of Chicago, is a consent in writing signed by the preferred stockholders of Rosenwald & Weil, Inc. reading as follows:

"Whereas, the Board of Directors of Rosenwald & Weil, Inc., a corporation, at a meeting held on to-wit January 20, 1931, adopted a certain resolution reciting the indebtedness of the corporation to The First National Bank of Chicago in the sum of \$215,000.00, partially secured by the pledge of sundry notes and accounts receivable amounting to approximately \$130,000.00, payment whereof had been demanded; and

"Whereas, said resolution authorized and approved the extension of the existing indebtedness, the loan of an additional sum of \$10,000.00 from said Bank, the pledge of the corporation's stock of merchandise, and the pledge and hypothecation of the notes and accounts receivable.

"Now, Therefore, in consideration of the premises and of the sum of One Dollar (\$1.00) in hand paid, the undersigned preferred stockholders of Rosenwald & Weil, Inc., a corporation, (out of a total of seven hundred and fifty shares issued and outstanding), as such preferred stockholders hereby ratify, confirm and approve the aforementioned resolution and all pledges and hypothecations of merchandise of every character, accounts

receivable, and/or notes receivable which have been made to The First National Bank of Chicago or its nominee to secure and/or apply on the indebtedness of Rosenwald & Weil, Inc.

"Number of
Shares

Name

| | | |
|-----|---------------------------|--------|
| 50 | Max J. Heep | (Seal) |
| 50 | Sam Schackman | (Seal) |
| 50 | John H. Vogwill | (Seal) |
| 50 | Leon F. Ottenheimer | (Seal) |
| 350 | Lessing Rosenwald, | (Seal) |
| | Executor Estate of Julius | |
| | Rosenwald Deed. | |

100

G. A. Hudson

(Seal)"

The commissioner concluded his report as follows:

"The Commissioner finds that the evidence offered by the Complainant is not sufficient to overcome the sworn answers of the defendants.

"The Commissioner concludes, basing his conclusion upon the foregoing facts, that the bill of complaint as amended is without equity and should be by the Court dismissed for want of equity."

Complainant contends that the master erred in assuming that under the pleadings in the case the sworn answer of appellant had to be overcome by two witnesses or the equivalent thereto, for the reason that the general rule invoked by the master does not apply to the instant pleadings as the verification to the answer is based "on information and belief and such answers have no probative value." Complainant misstates the language of the verification, which is as follows:

"Thomas J. Butler, being first duly sworn on oath, deposes and says that he has read the foregoing answer by him subscribed, knows the contents thereof and that the same is true to the best of his knowledge and belief.

"Thomas J. Butler.

"Subscribed and sworn to before me
this 20th day of April, A. D. 1933.

"G. C. Morris,
(Seal) Notary Public."

In support of his contention complainant cites Deimei v. Brown, 136 Ill. 586, and People v. West Englewood Bank, 353 Ill. 451, wherein the answers were verified upon information and belief only. In view of our opinion in Reliance Bank & Trust Co. v. Dalsey, 263 Ill. App. 546,

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we are inclined to believe that the master did not err in his legal conclusion as to the effect of the pleadings. But if it be assumed for the purposes of this case that the master erred, nevertheless, the argument of complainant that because of the alleged error "the master's report is of no value," is without the slightest merit, as we are satisfied that the findings of fact contained in the report are not only justified by the evidence, but that contrary findings would have been wholly unjustified under the proof.

Appellant contends that "there is no evidence of any intent to defraud creditors. The mere fact that a preference might have resulted to defendant by reason of the pledge affords no ground for its avoidance." The principle of law stated in the contention is undoubtedly sound. (See Wood v. Clark, 121 Ill. 359, 366; Merchants' National Bank v. Lyon, 185 Ill. 343, 354; Sawyer v. Moyer, 109 Ill. 461, 465; Bowman v. Ash, 143 Ill. 649, 661; Willson, Receiver v. Labhart, 269 Ill. App. 93.) In support of its argument that "there is not a scintilla of evidence tending to establish a prima facie case of fraud, or of an intent to defraud," appellant analyzes all of the evidence that bears upon the subject. Complainant, in answer to the argument of appellant, cites the findings of fact in the decree and contends that while appellant assigned as one of the errors relied upon for a reversal that the findings in the decree are without support in the evidence, it waived the point because it failed to argue it and "the findings of facts must therefore be taken as true, and we will only answer the argument that the conclusions were erroneous." (Italics ours.) As a large part of appellant's brief is an argument that the findings of the chancellor are not warranted by the evidence, the position of complainant practically amounts to an admission that the findings of the chancellor cannot be supported by the proof and must be sustained upon technical

grounds. All of the evidence was taken by the special commissioner, and as the chancellor heard no witnesses the general rule as to the weight to be given to a chancellor's findings has no application here.

"All of the testimony taken in this case was taken before the master in chancery. None of it was taken in open court. The master had some advantage in being able to see and hear practically all the witnesses, but the chancellor was in no better position to weigh the evidence than we are. Inasmuch, therefore, as the chancellor has not seen and heard the witnesses we are not bound by the rule that the finding of the chancellor will not be disturbed unless it is clearly and manifestly against the weight of the evidence." (Oliver v. Ross, 289 Ill. 624, 637. See also the late case of Stasch v. Stasch, 355 Ill. 581, 583.)

The question in this court is, Is the decree rendered by the chancellor the proper one under the law and the evidence?

The validity of the debt of Rosenwald & Weil to the Bank is not questioned, nor is the validity of any pledge of assets made prior to the meeting of the board of directors of Rosenwald & Weil on January 20, 1931, questioned. We are satisfied that the following argument of appellant is fully supported by the proof: "It was sound banking practice for defendant, before it advanced the additional \$10,000 on April 15, 1931, to require Rosenwald & Weil to pledge additional collateral, not only for the additional amount then borrowed, but for all of its existing indebtedness to the defendant; there was ample present consideration for the pledge, in the form of the new loan and the extension of the old one, and there was nothing out of the ordinary in the transaction." As we read the record appellant merely exercised its legal right to protect its interests as a bank and as a bona fide creditor. Complainant's major point that the pledge of merchandise on April 15, 1931, "violated the prohibition provision of the charter and was void," and that the moneys received by the bank by reason of the pledge should be returned, is without merit.

In the view that we have taken of this appeal we do not deem it necessary to consider several other points raised by

The first part of the document is a list of names and titles, including the names of the members of the committee and the names of the organizations that have contributed to the work of the committee. The list is organized in a table with three columns: the name of the member, the name of the organization, and the name of the title. The names of the members are listed in the first column, the names of the organizations in the second column, and the names of the titles in the third column. The names of the members are listed in alphabetical order, and the names of the organizations are listed in alphabetical order. The names of the titles are listed in alphabetical order. The list is organized in a table with three columns: the name of the member, the name of the organization, and the name of the title. The names of the members are listed in the first column, the names of the organizations in the second column, and the names of the titles in the third column. The names of the members are listed in alphabetical order, and the names of the organizations are listed in alphabetical order. The names of the titles are listed in alphabetical order.

appellant.

The officers and directors of Rosenwald and Weil have not appealed from the decree.

The decree of the Superior court of Cook county as to The First National Bank of Chicago, appellant, is reversed, and the cause is remanded with directions to dismiss complainant's bill as to The First National Bank of Chicago, appellant, for want of equity.

DECREE AS TO THE FIRST NATIONAL BANK OF CHICAGO, APPELLANT, REVERSED; AND CAUSE REMANDED WITH DIRECTIONS TO DISMISS COMPLAINANT'S BILL AS TO THE FIRST NATIONAL BANK OF CHICAGO, APPELLANT, FOR WANT OF EQUITY.

Sullivan, P. J., and Friend, J., concur.

38418

ROCK-OLA MANUFACTURING COR-
PORATION, a corporation,
Appellee,

v.

GENCO, INC., a corporation,
LOUIS W. GENSBURG, MYER GENSBURG
and DAVID GENSBURG,
Appellants.

APPEAL FROM SUPERIOR
COURT OF COCK COUNTY.

288 I.A. 625³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Rock-Ola Manufacturing Corporation, a corporation, filed its complaint against Genco, Inc., a corporation, and three of its officers, Louis W. Gensburg, Myer Gensburg and David Gensburg. Plaintiff was manufacturing and selling a coin-operated machine simulating a baseball game, named "World's Series." Defendants were also manufacturing and selling a coin-operated machine simulating a baseball game, named "Genco Official Baseball." The complaint alleges that defendants were guilty of unfair competition in that their machine simulated plaintiff's, that their advertisements simulated plaintiff's advertisements, and that such unfair practices were calculated to confuse buyers into the belief that they were buying the same game as plaintiff's. Although defendants promptly filed a verified answer to the complaint a temporary injunction was issued.

The cause was referred to a master and the material parts of his report are as follows:

"That the plaintiff, Rock-Ola Manufacturing Corporation, is a corporation duly organized under and by virtue of the laws of the State of Illinois and engaged in the manufacture of coin controlled amusement machine games and devices, and is located at 625 West Jackson Boulevard, Chicago, Illinois; that the said corporation manufactures a game known as 'World's Series'; that

the words 'World's Series' were registered in the United States Patent Office as Plaintiff's Trade-Mark on, to-wit, October 24th, 1933, as Trade-Mark Number 307451.

"That the defendant, Genco, Inc., is a corporation duly organized under and by virtue of the laws of the State of Illinois, and engaged in the manufacture of pin games, novelties and skill games, and is located in the City of Chicago, Illinois; among the games manufactured by Genco, Inc., is one known as 'Genco Official Baseball.'

"That the defendant, Louis W. Gensburg, is President of Genco, Inc., and resides at the Park Lane Hotel, Sheridan and Surf Street, Chicago, Illinois.

"That the defendant, Myer Gensburg, is Secretary of Genco, Inc., and resides at 1436 Berwyn Avenue, Chicago, Illinois.

"That the defendant, David Gensburg is Treasurer of Genco, Inc., and resides at 1055 Granville Avenue, Chicago, Illinois.

"That the evidence adduced does not support plaintiff's contention that the product of defendants ('Genco Official Baseball') is inferior to that of plaintiff or that it has a tendency to deceive the public into buying defendants' game in lieu of that of plaintiff.

"That plaintiff's contention that probable deception will result by reason of defendants advertising and selling their game, 'Genco Official Baseball', is not supported by the evidence; nor was any evidence offered to substantiate the charge that actual confusion has arisen with the buying public.

"The plaintiff has charged that because of defendants having had pictures made of their machine, and advertising the same as 'Official Baseball', 'The Balls Actually Run the Bases', have caused buyers to order its machine, thinking they are receiving the 'World's Series' machine; many letters and telegrams, part of Plaintiff's Exhibits One hundred seventy-four (174) to Eight hundred eight (808), both inclusive, containing orders for defendants' game, plainly indicate that the buyers were dealers in games and knew whose product they were buying when they ordered 'Genco Official Baseball.'

"An examination of pictures of 'Genco Official Baseball' and 'World's Series', contained in advertisements appearing in many magazines offered as exhibits, both plaintiff's and defendants', including Exhibit A and Exhibit B, as attached to the Complaint fails to convince one that an average buyer would be deceived into buying one for the other.

"Incidental to the charge of unfair competition, the testimony concerning the price charged for the respective machines in controversy is not clear enough to warrant the Master making a finding on this point, different prices having been charged for each machine at different times; however, the mere selling of a product by a competitor at a reduced price, of itself, does not constitute unfair competition, and, other charges failing, would not have to be considered.

"There was a preponderance of evidence to support defendants in their statement that 'Genco Official Baseball' was automatic and an inspection and playing of the game itself confirms this statement.

"The evidence, and an inspection and playing of the game 'Genco Official Baseball' supports the defendants in their statement that 'The Balls Actually Run the Bases' to an extent that the balls used on any similar game could be said to run the bases.

"The above being true, the defendants would have a legal right to use the phrase 'The Balls Actually Run the Bases' in their advertising and not be guilty of plagiarizing the verbiage contained in plaintiff's advertising wherein plaintiff states: 'It Is the Only Game Ever Invented Where Players Actually Run from Base to Base.'

"That the balls on plaintiff's machine 'World's Series' do not run the bases.

"No evidence was offered by plaintiff to substantiate the charge that the defendants have taken the secondary meaning of words of plaintiff's advertising and re-vamped their advertising so that the gist of plaintiff's advertising was published on behalf of said defendants.

"The evidence adduced both by plaintiff and defendants fully supports plaintiff's contention that at the time plaintiff exhibited its 'World's Series' game at the Convention and Exhibit of the Coin Machine Manufacturers Association held at Chicago, Illinois, between February 19th, 1934 and February 22nd, 1934, defendants had no machine like the machine of 'Official Baseball'; however, defendants' evidence that they had contemplated and produced one at this time remains unchallenged; likewise defendants' evidence that they had conceived 'Genco Official Baseball' before the exhibition of plaintiff's machine at said Convention, was ample to overcome plaintiff's charge to the contrary.

"It is charged by plaintiff 'that only after the exhibition of plaintiff's "World's Series" game at the Convention and Exhibit did defendants first build a coin-controlled amusement machine, imitating plaintiff's "World's Series" machine', while the evidence shows that the plaintiff manufactured two models of its game 'World's Series', one referred to as the 'Pin Model' and the other referred to as the 'Rail Model'; that the game exhibited at the Convention and Exhibit of the Coin Machine Manufacturers Association was the 'Pin Model', while in all the advertisements appearing in the different magazines offered as plaintiff's and defendants' exhibits, a picture of the 'Rail Model' appears and Exhibit 'A', attached to complaint filed herein, is a picture of the 'Rail Model.'

"An inspection of 'World's Series' shows a series of pins at the top of the playing board thereof, and an examination of 'Genco Official Baseball' shows only rails at the top of the playing board thereof.

"That the defendants are not guilty of palming off their 'Genco Official Baseball' machine as and for that of plaintiff's 'World's Series' machine.

"That the defendants are not guilty of unfair competition and unfair trade.

"The violation of the Code of Fair Competition for the Coin Operated Machine Manufacturing Industry is incidental to the main charge of unfair competition. The evidence does not support plaintiff's charge that defendants are guilty of violating sections A, C and F of Article VI of said Code.

"Conclusions.

"That the material allegations of the plaintiff have not been sustained by the evidence.

"That the equities of the case are with the defendants and against the plaintiff.

"That the plaintiff is not entitled to the relief or any part thereof as prayed for in its complaint.

"That the defendants are not guilty of unfair competition and unfair trade.

"That the plaintiff is not entitled to an accounting of the profits made by defendants in the sale of their game 'Genco Official Baseball.'

"WHEREFORE, I RESPECTFULLY RECOMMEND that the Injunction pendente lite issued herein by this Honorable Court on April 27th, 1934, should be dissolved and a permanent Injunction should not issue; that plaintiff's complaint be dismissed for want of equity and a decree be entered accordingly."

Plaintiff's exceptions to the master's report were sustained by the court and a decree was entered, the injunctive parts of which are as follows:

"That the temporary injunction heretofore issued by this Court be and the same is hereby made permanent and perpetual.

"That the defendants, Genco, Inc., a corporation, Louis W. Gensburg, Myer Gensburg and David Gensburg, be and they are hereby perpetually restrained and enjoined from:

"1. From selling the machine called 'Official Baseball' through the means of advertisement or written statements heretofore published by them;

"2. From selling, distributing or delivering any of said machines on orders heretofore received by them, or renewals of such orders, by reason of such unfair competition and such advertising and publication;

"3. From advertising or publishing, either directly or indirectly, in any manner, the manufacture, sale or distribution of said machine as at present constituted or with any changes therein which do not substantially affect its present form. Nothing in this clause contained shall prohibit the manufacture, sale and distribution of said machine without the advertising and publication hereby restrained."

The above paragraphs, save the first, follow verbatim the injunctive parts of the preliminary injunction. The costs of the suit, amounting to more than \$5,000 were taxed against defendant corporation.

The complaint also contains a charge that defendants violated the provisions of the National Recovery Act, but plaintiff concedes

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that this charge need not be considered because of the decision in Schechter Corp. v. U. S., 295 U. S. 495, declaring that act unconstitutional.

The first question to determine is, What constitutes unfair competition within the meaning of the law of this state?

We quote from Stevens-Davis Co. v. Mather & Co., 230 Ill.App.45,64-66:

"In Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 119, a leading case, the Supreme Court of the United States said (p. 140) that: 'The essence of the wrong in unfair competition consists in the sale of goods of one manufacturer or vendor for those of another and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails.' It is unnecessary to cite the numerous decisions that have announced this rule. It may be confidently and positively stated that the rule has been adopted by nearly all of the courts of the United States, both federal and state. In harmony with the other jurisdictions, the Supreme Court of this state has adopted the 'palming off' rule as the rule of decision in cases of unfair competition, and that rule has been repeatedly announced by this court and other appellate courts of the state.

"In Ball v. Siegel, 116 Ill. 137, the court said (p. 146): The test is, whether the words used 'would be likely to mislead persons in the ordinary course of purchasing the goods and induce them to suppose they were purchasing the genuine article.'

"In Hazelton Boiler Co. v. Hazelton Tripod Boiler Co., 142 Ill. 494, the court said (p. 509): 'It is not shown that the defendant has ever attempted in any way to palm off its own boilers as being of the complainant's manufacture.'

"In DeLong Hook & Eye Co. v. Hump Hairpin Mfg. Co., 297 Ill. 359, the court said (p. 369): 'The burden of proof of the secondary meaning of the hump as referring to the appellee is upon the appellee * * * to show that the use of the word by appellant will result in passing off its goods as the manufacture of the appellee'; and on page 371 the court quoted with approval from the case of Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 119, which holds that unfair competition 'consists in the sale of the goods of one manufacturer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails.'

"In Chicago Directory Co. v. Herringshaw, 187 Ill. App. 489, the court said (p. 499): 'Unfair competition consists in passing off or attempting to pass off upon the public the goods or business of one person as and for the goods or business of another.' To the same effect are the cases of Merchants' Detective Ass'n v. Detective Mercantile Agency, 25 Ill. App. 250, 259; Bender v. Bender Store & Office Fixture Co., 178 Ill. App. 203, 207; Yellow Cab Co. v. Ensler, 214 Ill. App. 607, 610; Hughes v. West Pub. Co., 225 Ill. App. 58, 66; Nestor Johnson Mfg. Co. v. Alfred Johnson Skate Co., 229 Ill. App. 549.

"The courts in this State do not treat the 'palming off' doctrine as merely the designation of a typical class of cases of unfair competition, but they announce it as the rule of law itself -

the test by which it is determined whether a given state of facts constitutes unfair competition as a matter of law. As the Supreme Court of this State said in the case of DeLong Hook & Eye Co. v. Hump Hairpin Mfg. Co., supra, quoting from the Supreme Court of the United States in the case of Howe Scale Co. v. Wyckoff, Seamans & Benedict, supra: 'If defendant so conducts its business as not to palm off its goods as those of complainant, the action fails.' We are of the opinion from our examination of the authorities, that the 'palming off' doctrine has been followed by both the state and federal courts in an almost unbroken line of decisions, as a rule of law, and that the courts of this state also deem it to be a rule of law."

Plaintiff concedes that the rule stated in DeLong Hook & Eye Co. v. Hump Hairpin Co., 297 Ill. 359, was the rule in this state, but contends that it was overruled in Johnson Mfg. Co. v. Johnson Skate Co., 313 Ill. 106. That case, in our judgment, not only did not change the rule laid down in the DeLong case but refers to the latter case with approval. In the opinion in the Johnson case (pp. 121 and 122) the court, in support of its ruling, points out numerous instances in which the defendant simulated the name of complainant, the location of the business, the advertising, and other features calculated to deceive the ordinary purchaser.

Defendants contend that the meaning and effect of the injunctive parts of the decree are not plain and that "it is difficult to understand what the decree does mean." That there is some merit in this contention is obvious. The decree does not adjudge that defendants' game is a simulation of the game of plaintiff, nor that the sale of the same would, in itself, constitute unfair competition. When paragraphs 1, 2 and 3 are considered together, it would seem that the court intended only to enjoin the sale of defendants' machine through the means of the advertisement in question. Defendants are justified in contending that the decree must be construed to mean that neither defendants' machine nor its name simulated that of plaintiff, and that as plaintiff did not file a cross-appeal it cannot now ~~in~~ question, in any way, the decree. We have concluded, however, to also consider the simulation charge: In the consider-

ation of this appeal we had before us, as exhibits, both machines. The master found that defendants were not guilty of palming off the "Genco Official Baseball" machine as and for that of plaintiff's "World's Series" machine, and after an examination of the evidence bearing upon the subject, including the said exhibits, we are satisfied that no other finding would have been justified under the proof. In their brief defendants illustrate, in the following apt way, twenty-two differences in the machines:

"World Series.

"Genco Official Baseball.

"1. The balls do not run the bases.

"1. The balls do run the bases.

"2. Revolving disc or diamond.

"2. Stationary diamond.

"3. In upper end of playing board, numerous pins not forming lanes or runways.

"3. Rails forming runways in upper end of playing board.

"4. No rail surrounding the playing field.

"4. Rail surrounding the playing field.

"5. No pennants on outside rail surrounding the playing field.

"5. Pennants on outside rail surrounding the playing field.

"6. Small baseball with small flag. Above baseball a large banner and inscribed thereon the word 'World's Series'.

"6. Large baseball with 'Genco Official' imprinted thereon. Across baseball a banner with the word 'Baseball' inscribed thereon.

"7. In Exhibit 'A' top of rails in upper end of playing board uneven, forming more or less a half circle.

"7. Top of rails in upper playing board out off in straight line.

"8. No runways with legends.

"8. At top end of runways in upper playing board, legends indicating bases: '1st', '2nd', '3rd' and 'HOME RUN'.

"9. No celluloid covers.

"9. Celluloid covers over rails.

"10. No metal traps or gates.

"10. Metal traps or gates.

"11. No 'foul balls'.

"11. 'Foul ball' openings and indications.

"12. Nothing in center of diamond.

"12. Metallic baseball player with bat in center of diamond.

"13. No rails surrounding diamond.

"13. Metal rails entirely surrounding diamond.

"14. Large casting in center of playing board.

"15. 'Balls' and 'strikes' indicated above metal casting in center of playing board.

"16. 'Outs' indicated by registering device in center of playing board to left of the center casting - 'Outs' being shown by changing numbers.

"17. No casting in bottom of playing board.

"18. Tilting device, of irregular shape, located in right-hand lower corner of game.

"19. 'Runs' indicated by hole in board in lower end of playing field.

"20. 'Errors' not indicated.

"21. When ball get in 'hit' runway, player does not know how many bases he is going to get.

"22. When player has 3 balls in ball groove and he gets a fourth ball, the ball overflows into 'hit' column and he may get a one, two, or three base hit, or a home run."

"14. No casting in center of playing board.

"15. No 'balls' or 'strikes' indicated.

"16. 'Outs' indicated by balls themselves in metal casting at bottom of playing board; no numbers changing.

"17. Lower end of playing board consists of a large rectangular casting.

"18. In the center and at the lower end of the playing board, diamond shaped tilting device casting.

"19. 'Runs' indicated by run trough in large metal casting in lower end of playing field.

"20. 'Errors' indicated by opening in lower end of playing board.

"21. When ball gets in runway player knows exactly what number of bases he is going to get.

"22. No provision for 'base on balls'."

Plaintiff does not seriously question these differences in the machines. The absurdity of the claim that defendants' machine simulates plaintiff's is shown by the testimony of David C. Rockola, president of plaintiff corporation. That witness, in attempting to prove that plaintiff's machine was superior to defendants', emphasized many differences in the two machines. The name of plaintiff's machine is "World's Series," and the name of defendants' is "Genco Official Baseball." The argument that there is a similarity in the names is an idle one. While both machines are coin operated and simulate baseball, it is conceded, of course, that plaintiff has no exclusive right to sell coin-operated machines nor machines that

simulate baseball.

As to the alleged unfair advertisement, the master found that there was no merit in this claim, and we are fully in accord with that finding.

The novelty of machines of the kind in question soon wears off and the demand for them ceases, and defendants bitterly complain that plaintiff's suit was instituted solely to secure to it an unwarranted monopoly in the sale of such machines and that plaintiff, through the preliminary injunction and the injunctional decree, accomplished its purpose, to the great injury of defendants. We feel impelled to say that this complaint is not without merit.

The decree of the Superior court of Cook county is reversed, and the cause is remanded with directions to the trial court to dismiss plaintiff's complaint for want of equity, at plaintiff's costs, that court retaining jurisdiction for the assessment of damages for the wrongful issuance of the preliminary and permanent injunctions.

DECREE REVERSED, AND CAUSE REMANDED WITH DIRECTIONS TO DISMISS PLAINTIFF'S COMPLAINT FOR WANT OF EQUITY, AT PLAINTIFF'S COSTS, THAT COURT RETAINING JURISDICTION FOR THE ASSESSMENT OF DAMAGES FOR THE WRONGFUL ISSUANCE OF THE PRELIMINARY AND PERMANENT INJUNCTIONS.

Sullivan, P. J., and Friend, J., concur.

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POLISH ROMAN CATHOLIC UNION OF
AMERICA, a corporation,
(Complainant) Appellee,

v.

WALTER DOENGES et al.,
Defendants.

MARION MARVIN, individually and
as Administrator of the Estate
of Teodor Zamara, Deceased,
(Defendant) Appellant.

MARION MARVIN, individually and
as Administrator of the Estate
of Teodor Zamara, Deceased,
(Cross-Complainant) Appellant,

v.

POLISH ROMAN CATHOLIC UNION OF
AMERICA, a corporation, and
CITY OF CHICAGO, a municipal
corporation, et al.,
(Cross-Defendants) Appellees.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT,

Complainant, Polish Roman Catholic Union of America, a corporation, filed its suit to foreclose a first mortgage on certain premises. Marion Marvin, administrator of the estate of Teodor Zamara, deceased, one of the defendants, filed his cross-bill asking affirmative relief against complainant and certain defendants. The cause was referred to a master in chancery, who, after a hearing, filed a report finding that complainant had a first lien on the property sought to be foreclosed and that the estate of Teodor Zamara was liable to the

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

288 I.A. 626

THE UNIVERSITY OF CHICAGO
CHICAGO, ILLINOIS

[illegible]

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

extent of the first mortgage, plus interest and all costs and taxes paid; that cross-complainant had not sustained the allegations of his cross-bill, and his prayer for affirmative relief against certain defendants should be denied. The chancellor sustained the master in all respects save as to the question of the liability of the estate of Teodor Zamara, ruling that there was no liability of that estate under the first mortgage. Marion Marvin, individually and as trustee, appeals from the decree. The amount found due complainant is not disputed save that appellant claims to be entitled to a setoff as to the matters he alleges in his cross-bill. Appellant states in his brief that his cross-bill asks for "affirmative relief against the complainant and several others and sets up that money arising out of a condemnation proceeding had been wrongfully and fraudulently paid by the City of Chicago and that the complainant and other defendants herein entered into a conspiracy against Marion Marvin, administrator, and did wrongfully and fraudulently obtain money belonging to him, and did wrongfully and fraudulently obtain an unauthorized partial release of the property sought to be foreclosed and used the money to destroy the security of a junior mortgage belonging to Marion Marvin as said administrator."

The mortgage foreclosed was for \$15,000. It was executed on October 21, 1920, by defendant Doenges, the then owner of the property. About the same date Doenges gave complainant a second mortgage on the premises in the sum of \$4,000. The property, upon which were three buildings used as stores and apartments, was located at Ashland avenue and Superior street, in Chicago. On January 20, 1922, Doenges conveyed the premises to Teodor Zamara and Zofia Zamara, his wife, as joint tenants, subject to complainant's mortgages. The appellant is a son of this couple. On October 21, 1925, the two mortgages were extended, by agreement, for a period

of five years. On September 22, 1925, Teodor and Zofia Zamara conveyed the premises to Jeanette Grossman and on the same date the latter conveyed them to Teodor Zamara. On June 1, 1926, Teodor Zamara and his wife conveyed the premises to Wanda Szumkowski, defendant, and she and her husband, Alfons J. Szumkowski, gave a trustee deed on the property to Wladyslawa Jankowski, trustee, to secure their two notes, one in the sum of \$10,000, made payable to the makers and indorsed by them in blank, payable on or before five years after date, and one in the sum of \$5,000, payable two years after date. The notes and mortgage were taken by Zamara as part of the purchase price. The \$5,000 note was paid by the Szumkowskis and returned to them. Alfons J. Szumkowski is an uncle of appellant and a brother of Zofia Zamara. On July 8, 1928, the Szumkowskis executed a trust deed to Samuel Susina, trustee, to secure notes in the sum of \$6,244.70, which trust deed and notes were owned by Dr. Leonard Szumkowski, brother of Alfons J. Szumkowski and Zofia Zamara, and brother-in-law of Wanda Szumkowski. Sometime between 1925 and 1930, City of Chicago, defendant (hereinafter called City), commenced proceedings to condemn approximately seventeen feet of the property, and a judgment for condemnation was entered in which the award for the property condemned was fixed at \$40,000. Upon the death of Teodor Zamara the \$10,000 note and the trust deed securing the same became the property of his estate, represented in this cause by appellant, administrator. Wanda Szumkowski, the then owner of the property, and her husband employed Frank Posvic, defendant, a lawyer, to represent them in the condemnation proceedings. On June 30, 1930, the Szumkowskis made a contract with Carlson & Berggren Company "to make certain improvements, alterations, moving, wrecking, heating, plumbing, tile work, etc.," in connection with the premises in question, for \$13,250, \$10,000 of which was to be paid in cash,

and \$3,250 in notes. It is admitted that on November 12, 1930, appellant, although he was not appointed administrator of the estate of Teodor Zamiara, his father, until November 20, 1930, went with a man from Posvic's office to some department of the City, in the City Hall, presumably the board of local improvements, and presented the \$10,000 note belonging to the Zamiara estate and the trust deed securing the same, to some unidentified clerk, and that the latter, in the presence of appellant, stamped indorsements on the back of the trust deed and note. The indorsement on the back of the note is as follows:

"The Trust Deed securing this note, by consent of the owners and holders hereof, has been released by the Trustee named therein as to that portion of the real estate in said Trust Deed described which was taken by the City of Chicago for public use in condemnation proceeding known as Case Number B-71144 Cir. Court of Cook County, said Trust Deed is no longer a lien on that portion of said real estate so taken for public use in said proceeding. This endorsement made 11/12/30."

The indorsement on the back of the trust deed is as follows:

"This Trust Deed, by consent of the owners and holders of all principal and interest notes secured hereby, has been released by the Trustee herein named as to that portion of the real estate herein described which was taken by the City of Chicago for public use in condemnation proceeding known as Case Number B-71144 Cir. Court of Cook County and is no longer a lien on that portion of said real estate so taken for public use in said proceeding. This endorsement made 11/12/30."

The City claims that appellant also delivered to the clerk a partial release of the trust deed owned by appellant as administrator. In his brief appellant disputes this claim. It is undisputed that Alfons J. Szumkowski, accompanied by his sister, Zofia Zamiara, went to the trustee of the said trust deed and obtained from her a partial release of the trust deed, which they then gave to Posvic. Szumkowski testified that they received the partial release of the trust deed from the trustee and Zofia Zamiara turned it over to Posvic, and "it was taken over to the City Hall and turned over to the authorities there, after the changes were made." Posvic testified that Alfons Szumkowski, Zofia Zamiara and appellant came to

The first part of the report deals with the general situation of the country. It is a very interesting and informative study of the country's development. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country's development. It is a must-read for anyone interested in the country's future.

The second part of the report deals with the economic situation of the country. It is a very detailed and comprehensive study of the country's economy. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country's economy. It is a must-read for anyone interested in the country's economic future.

The third part of the report deals with the social situation of the country. It is a very detailed and comprehensive study of the country's social structure. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country's social development. It is a must-read for anyone interested in the country's social future.

his office and Zofia Zamara handed him the release deed and he gave it to appellant and told him to take it and the note and trust deed to the board of local improvements. After Posvic had so testified appellant again testified, but he did not deny the statement by Posvic, although he stated that he never authorized anyone to obtain a release from the trustee. We shall again refer to the subject matter of the delivery of the partial release deed to the City.

While the condemnation proceedings were pending Wanda Szumkowski and Posvic, her attorney, appeared at a meeting of the board of directors of complainant, who agreed, upon her urgent request, to give her an opportunity to protect her interest in the property by not demanding of the City the payment of the first mortgage of \$15,000, and agreed with Mrs. Szumkowski that out of the proceeds of the condemnation award \$10,000 should be turned over to complainant, to be used in paying for labor and materials in the matter of the alteration and remodeling, etc., of the buildings, and in furtherance of the agreement complainant was to give a partial release of lien to the City. In accordance with the agreement complainant's notes and trust deed were indorsed by the City with a "partial release of lien" stamp. The note and trust deed for \$6,244.70, owned by Dr. Leonard Szumkowski, were also so indorsed by the City. Samuel Susina, the trustee in that trust deed, an attorney at law, acted for Dr. Szumkowski in the matter. Wanda Szumkowski and her husband collected the award from the City and turned over to their attorney, Posvic, \$35,070. Wanda Szumkowski testified that the City gave her the net amount of the award and that she turned it over to her attorney, Posvic. Complainant received \$10,000 and has accounted for it. The account shows a balance of \$1,335 on hand, which the master and chancellor found should be credited on complainant's mortgage, and it has been so

credited in the decree.

Appellant contends that money arising out of a condemnation proceeding is the property of the mortgagee, and not the property of the mortgagors; that at the time of the award, as administrator of the estate of Teodor Zamara, he had \$10,500 coming to him under the mortgage belonging to the Zamara estate, that the lien of this mortgage attached to the fund in the hands of the City, that the payment to the Szumkowskis was "without any authority and with notice that Marvin claimed the same," and that the payment of \$10,500 to the Szumkowskis constituted a "negligent payment by the City of Chicago," because of which he is entitled to a judgment against the City for the payment due him under his trust deed, etc. When the power of eminent domain is exercised the fund paid stands in place of the land condemned, a mortgagee's lien attaches to the fund, and he has the right to have the money, in place of the land, applied to the payment of his claim (Calumet River Ry. Co. v. Brown, 136 Ill. 322); but where the mortgagee releases his lien on the condemned property he loses that right. If appellant had stood upon his rights, the City would not have been justified in paying the \$10,500 to the Szumkowskis. The same would be true as to complainant's mortgage and Dr. Leonard Szumkowski's mortgage, if they had stood upon their rights. Appellant does not allege nor contend that the City was a party to the alleged conspiracy. In support of his claim that the City is liable appellant testified as follows: "Mr. Posvic stated that it was necessary for me to take the principal note due on this mortgage to the City Hall and have it indorsed by the Clerk before payment could be made, and if I did take the note and have it indorsed, a separate check in the amount of \$10,500 would be issued by the City of Chicago to Alfons Szumkowski and he would immediately indorse it and turn it over to me as payment

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of this mortgage. He asked me if I would do this. Not being acquainted with the City Hall I asked him if he would send somebody along with me, so he asked Mr. Pavlak to go along with me, and the note was indorsed and I asked the Clerk as he was making a memorandum of the \$10,500, whether or not he was going to issue a check for that amount separately and he said that was the reason of the memorandum and I asked him whether I would receive the check. He said the check, of course, would be payable to Alfons Szumkowski and through his indorsement would come to me;" that the clerk made the indorsements on the trust deed and the note in red; that Posvic further stated that in approximately thirty days the City would make payment. The witness stated that he had given "the gist of the conversation" with Posvic. In his cross-bill appellant alleges that the "purported release deed was a forgery and a nullity," and that the City deprived him of the security under the trust deed on a fraudulent release deed. In his reply brief he argues that the evidence does not show that a release deed was presented to the City by anyone. The uncontradicted evidence shows that Zofia Zamara, widow of Teodor Zamara and mother of appellant, and Alfons J. Szumkowski, uncle of appellant, went to Wladyslawa Jankowski, trustee, and obtained a partial release deed from her; that the trustee handed the release deed to Zofia Zamara and the latter thereafter, in the presence of appellant, gave it to Posvic. As we have heretofore stated, Posvic's testimony as to what occurred was not answered by appellant. The trustee testified that she gave Alfons Szumkowski and appellant's mother the release deed. The indorsements on the note and trust deed, which appellant admits handing to the clerk, specifically recite that the trust deed has been partially released by the trustee. The record shows that appellant is an intelligent man, and it is quite plain that he understood the nature of the transaction with the City. The instant contention that

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there is no evidence to show that a release deed was presented to the City is an afterthought and conflicts with the allegation of his cross-bill that the City paid the money upon a forged release. The master found that the note, trust deed and release deed were delivered to the City on November 12, 1930. No other finding would be justified under the evidence. Indeed, appellant, according to his own testimony, expected the City to pay the \$10,500 by giving a check for that amount to Alfons Szumkowski, made payable to the latter, and that Szumkowski would immediately indorse the check and turn it over to appellant. When the clerk in the board of local improvements received the release deed from appellant and made the customary indorsements on the trust deed and note presented to him by appellant, so far as the City was concerned the property condemned was cleared of the lien of appellant's trust deed. The clerk represented the interests of the City and it was not his duty to see that Szumkowski paid the \$10,500 to appellant. The City's duty, under the circumstances, was to pay the award to the owners of the property. Not only appellant, but his mother, the widow of Teodor Zamara, seem to have been willing to have the trustee partially release the trust deed so that the City would pay the award to the Szumkowskis. For aught that appears in the record appellant and his mother were the only heirs of Teodor Zamara. Furthermore, as we have heretofore stated, appellant was not appointed administrator until November 20, 1930. The Szumkowskis were endeavoring to save their interest in the property, and it is a reasonable inference from the evidence that appellant and his mother, in what they did, were endeavoring to aid their close relatives. The master and the chancellor would have been fully justified in finding, from all the facts and circumstances, that the clerk made no promises of any kind to appellant in reference to the payment

of the award. But even if he made the statements appellant claims he did, the City, under the record, would not be bound thereby. If appellant believed that he had a claim against the City, why did he defer making it until the cross-bill was filed, nearly two years after the payment of the award? When he received information that the City had made payment to the Szumkowskis he did not go to the City about the matter, but to Posvic, to whom he stated that he had heard that the City had made the payment to the Szumkowskis but that he "had not received the money due on the mortgage." The claim against the City appears to have been an afterthought and is without the slightest merit. As the City argues, appellant "should not be permitted to saddle upon the city a loss he might have sustained by reason of his own acts." The authorities cited by appellant in support of his contention that the City is liable have no application to the facts as we find them.

As to appellant's present position that complainant was a party to a conspiracy to defraud him: Neither in appellant's cross-bill nor in the amendment to it is there any allegation that complainant was a party to such conspiracy. The cross-bill alleges that "Wanda Szumkowski, Alfons J. Szumkowski, and Frank Posvic, entered into a conspiracy to deprive cross complainant of large sums of money which the City of Chicago had and possessed from the condemnation proceedings," and that if the City has paid the money belonging to appellant, it has been wrongfully, wilfully, and fraudulently retained by "Wanda Szumkowski, Alfons J. Szumkowski, and Frank Posvic." We have very carefully examined all of the evidence that bears upon the alleged conspiracy to defraud appellant and are unable to find any ground upon which a claim could be reasonably based that complainant was a party to such a conspiracy. According to appellant the conspiracy started in Posvic's office on November 12,

1930, but he is forced to concede that neither complainant nor the City was represented at that meeting. He is further forced to admit that no representative of complainant was present when he went to the City department and had the indorsements put on his note and trust deed. He does not contend that there is any evidence that any representative of complainant had anything to do with securing the partial release deed or turning it over to the City. It is true, as appellant argues, that the general counsel of complainant was present at the City Hall when the award was paid. He was there to get the \$10,000 which the Szumkowskis had agreed should be left in escrow with complainant for the purpose of paying for the alterations, etc., of the buildings. He did get it, it was placed by complainant in an escrow fund, has been accounted for by it, and the Szumkowskis are raising no issue in reference thereto. Indeed, they filed no objections to the report of the master. As to the meeting in Posvic's office on November 12, 1930: Appellant testified that there were present his uncle, Alfons J. Szumkowski; his mother, Zofia Zamjars; Dr. Jeanette Leszcynski; Pavlak, and Posvic. We have heretofore stated appellant's testimony as to what occurred there. Two other witnesses testified in reference thereto, Alfons J. Szumkowski and Posvic. When he was first called as a witness by appellant, Szumkowski testified that there was a conversation between appellant and Posvic; that "Posvic said in order to speed up the release necessary to pay the award by the City for Mr. Marvin to go to the City Hall and have his papers, I guess there was a mortgage and note, endorsed by the City;" that appellant said he was not familiar with the City Hall and did not know where to go, so Pavlak said he would show him where it was, "and so they left the office and that is the last I saw of them." The witness then stated that Posvic instructed appellant to bring the papers back "within the time that the City was going to pay the award." Posvic testified

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that appellant's mother handed him the release deed and he turned it over to appellant and told him to take the release together with the \$10,000 note and trust deed to the board of local improvements; that Pavlak accompanied appellant to the City Hall; that he did not promise appellant that he would pay him \$10,500 out of the award but that Alfons Szumkowski and Wanda Szumkowski told appellant that they would pay him the money if there was enough left after Dr. Szumkowski and complainant had been taken care of and Posvic's fees had been paid. Although appellant's mother, Dr. Leonard Szumkowski, Dr. Jeannette Leszcynski and Pavlak, none of whom appellant claims was a party to the alleged conspiracy, were also present at the time of the inception of the alleged conspiracy, none was called as a witness by appellant. Appellant contends that the evidence shows that the release deed secured by his mother and his uncle was altered by Posvic after it had been delivered to him and that it was therefore invalidated, and he seems to argue that this is a circumstance tending to prove the alleged conspiracy. The testimony upon which appellant relies in support of this contention was given by Alfons J. Szumkowski, who was twice called by appellant as a witness. In his first testimony, heretofore stated by us, as to what occurred in Posvic's office on November 12, 1930, he made no mention that there had been any alteration in the release deed. He was again called by appellant at the close of all the evidence and he then testified that Posvic read over the release deed and stated that changes should be made in it or a different release obtained from the trustee. None of the persons present at the time in question, not even appellant, corroborated this last testimony by Szumkowski. After a careful study of the record it seems reasonably clear to us that appellant did not regard the Szumkowskis as real defendants to his cross-bill. While attorneys filed an answer for

the Szumkowskis, to the bill, they appear to have thereafter taken no part in the proceedings. No answer was filed by the Szumkowskis to the cross-bill and no default was taken against them. In this state of the record a judgment could not have been taken against the Szumkowskis had appellant succeeded on his cross-bill. No brief in their behalf has been filed in this court. They seem to have taken no interest in the proceedings before the master until they were called as witnesses by appellant, and the manner in which they were examined by his counsel shows no effort to prove that they were, in fact, parties to a fraudulent conspiracy against appellant. We cannot escape the conclusion that they were used by appellant in an effort to make out a case against the City and complainant, the two financially responsible cross-defendants. Upon cross-examination Szumkowski admitted that when he was summoned he went to the office of appellant's attorney and asked him "about my affair in the case. What my chances are;" that he talked with the attorney "about my own interest in it;" "whether I have a good suit against the Polish Roman Catholic Union;" that he told the attorney he had been served with summons; that the attorney said, "Hire a lawyer and go to it." * * * He cannot act in my case." The master and the chancellor were fully warranted in refusing to believe Szumkowski's testimony as to the alleged alteration of the release deed and in concluding that it was given in a final effort to bolster up appellant's case against the City. In any event, appellant knew all that happened in Posvic's office at the time in question and he thereafter took the note, trust deed and release deed to the City and caused it to act upon them.

Counsel for appellant, in their effort to fortify their claim against the City and complainant, have seen fit to refer to several alleged matters which they concede are outside of the record.

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Furthermore, they intimate that the experienced and upright master who heard the cause may not have been impartial in his determination of it, and to support this entirely unwarranted intimation counsel refer to an alleged conversation, held since the termination of the proceedings, between one of appellant's counsel and a partner of the master. Such unfair tactics do not aid a litigant, and they are to be condemned.

Because of the way in which this case has been argued by appellant, we have been compelled to devote undue time to its consideration. It may be that appellant caused the City to pay over the \$10,500 to the Szumkowskis because of promises made to him by them which they have not kept; but his present plight is due to his own actions in the premises, and the fact that the Szumkowskis are, apparently, financially irresponsible, is no justification for the present attempt to make the City and complainant pay the loss he has sustained. However, it may well be doubted if the Szumkowskis promised appellant to pay him the \$10,500 as soon as they received it from the City. Wanda Szumkowski testified that she got the money from the City and immediately turned it over to her lawyer, Posvic. Appellant did not see fit to interrogate her nor her husband as to why they did not turn over the \$10,500 to him.

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

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EDWARD J. MORRISSEY and
MARIE S. MORRISSEY,
Appellees,

v.

BESSIE LUHAN,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

288 I.A. 626²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On March 6, 1933, complainants filed their bill against Joseph Luhan and Bessie Luhan. After an appearance had been entered for both defendants, but before the filing of an answer, Joseph Luhan died and the cause proceeded against Bessie Luhan. There was a reference to a master who, after hearing evidence, filed a report recommending a decree in accordance with the prayer of the bill. Exceptions to the master's report were overruled and a decree, in accordance with his recommendations, was entered, requiring Bessie Luhan to pay complainants \$6, 135.20 and the costs of the proceedings and to indemnify complainants against any loss they might suffer by reason of a certain judgment entered in the Municipal court of Chicago on January 12, 1932. Bessie Luhan, defendant, appeals.

No question is raised on the pleadings. On March 22, 1929, complainants owned Lots 21 and 23 in Knight & Wilson's Resubdivision of Block 11 of Ridge Acres, in the Village of Western Springs, Cook county, Illinois. Each lot was subject to the lien of a trust deed, both dated May 25, 1928, executed and delivered by complainants to secure their eight principal promissory notes for the aggregate principal sum of \$8,000, payable five years after the date thereof,

with interest at the rate of six per cent per annum, payable semi-annually, evidenced by eighty interest coupon notes of even date therewith for the sum of \$30 each, which trust deeds were duly recorded as documents numbered 10049321 and 10049323, respectively. Each lot was also subject to the lien of a junior trust deed, both dated May 25, 1928, executed and delivered by complainants to secure their principal promissory note of even date therewith for the sum of \$3,000, payable one year after the date thereof, together with interest thereon at the rate of six per cent per annum, payable semi-annually, which junior trust deeds were duly recorded as documents numbered 10049322 and 10049324, respectively. On March 22, 1929, complainants sold the premises to Joseph Luhan and Bessie Luhan and executed and delivered their warranty deed conveying the premises to them, "subject to all general taxes levied after the year 1927; all unpaid special taxes and special assessments; party wall agreements of record; building line restrictions and building restrictions of record; and to the following trust deeds: Trust deed dated May 25, 1928, recorded as Document No. 10049321, conveying Lot 21; Trust deed dated May 25, 1928, and recorded as Document No. 10049322, conveying Lot 21; Trust deed dated May 25, 1928, and recorded as Document No. 10049323, conveying Lot 23; Trust deed dated May 25, 1928, and recorded as Document No. 10049324, conveying Lot 23. The grantees herein by the acceptance of this deed hereby agree to assume and pay the incumbrances secured by said trust deeds." The aggregate indebtedness secured by the four trust deeds was credited on the purchase price of the premises. As soon as the deed was delivered to the Luhans they executed two warranty deeds, one conveying Lot 21 to Leslie B. Williams, and the other conveying Lot 23 to the same party. Each deed provided that the grantee assumed and agreed to pay the incumbrances secured by the said four trust deeds. On May 25, 1929

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The scientific aspect of the problem is concerned with the question of how life arose from non-life. The philosophical aspect is concerned with the question of whether life is a necessary part of the universe or whether it is a mere accident. The paper then proceeds to a discussion of the various theories of the origin of life. It is shown that the most plausible theory is that life arose from non-life through a series of chemical reactions. This theory is supported by the discovery of the RNA world and the discovery of the origin of the genetic code. The paper then discusses the question of the evolution of life. It is shown that life has evolved from simple organisms to complex organisms through a series of steps. The paper then discusses the question of the future of life. It is shown that life may continue to evolve for a long time to come. The paper concludes with a discussion of the implications of the theory of the origin of life for our understanding of the universe.

there matured under the terms of the two junior trust deeds principal indebtednesses aggregating \$6,000, together with instalments of interest thereon aggregating \$180. No part of the same was paid by the Luhans and the owners of the notes and interest coupons demanded payment from complainants. Thereupon complainants demanded of the Luhans that they pay the same. Neither of the Luhans paid the same, and on January 20, 1930, the owners of the notes and interest coupons obtained a judgment against complainants in the Municipal court of Chicago, Case No. 1426764, in the sum of \$3,140, being the amount of principal and interest due, and that was secured by the junior trust deed recorded as document No. 10049324. Complainants thereupon paid the amount of that judgment. The Luhans defaulted in the payment of certain instalments of interest as they matured on the indebtedness secured by the two senior trust deeds recorded as documents Nos. 10049321 and 10049323, and also the general taxes on the premises for the year 1928, and by reason of such defaults complainants were obliged to expend the following sums: "\$248.40 on May 8, 1930, for interest coupons due November 25, 1929, and accrued interest thereon; \$240 on June 9, 1930, for interest coupons due May 25, 1930; \$244.58 on February 16, 1931, for interest coupons due November 25, 1930, and accrued interest thereon; \$241.85 on July 7, 1931, for interest coupons due May 25, 1931, and accrued interest thereon; \$240 on December 16, 1931, for interest coupons due November 25, 1931; \$192.61 on July 14, 1930, for general taxes for the year 1928, and penalties thereon." On January 12, 1932, further proceedings were had in the cause in the Municipal court of Chicago and an additional judgment was entered against complainants in the sum of \$3,659, together with costs of suit, being the amount of principal and interest secured by the junior trust deed recorded as document No. 10049322, which judgment remains unsatisfied and in

full force and effect.

Complainants filed their bill to recover from defendants the various sums of money advanced by them, together with interest thereon, and for indemnification by defendants against any loss or damage complainants might sustain because or on account of the judgments entered against them in the Municipal court on January 12, 1932.

Defendant Bessie Luhan concedes, in her brief, that where the purchaser of real estate retains from the purchase price an amount sufficient to pay existing incumbrances that a promise to pay such incumbrances is implied, but she contends that such rule does not apply to her because, she argues, she was not the purchaser of the premises; she was not a party to any contract with complainants; she did not pay any part of the purchase price; she did not deduct any part of the purchase price because she did not pay any part of the purchase price; "she was in no way a party to the transaction in question;" that if her name appears on the several deeds introduced in evidence she signed such instruments solely because of directions given her by her husband; and that she did not know there was an assumption clause in the deed from complainants to the Luhans. The master and the chancellor found against all of these contentions, and after a careful examination of the facts and circumstances in evidence we are satisfied that they were warranted in so finding. Defendant suggests that the evidence would hardly warrant the conclusion that the amount of the incumbrances was deducted from the purchase price. This suggestion is an afterthought and without merit. The bill specifically alleges that complainants at the time of the sale "credited the said defendants with the sum of \$22,499, being the amount of the aggregate principal indebtednesses and the interest thereon which had accrued as of said date, secured by the said four Trust Deeds, which said sum was then and there

deducted from the purchase price of the said real estate and premises, and the balance of the consideration therefor was then and there received by your orators from the said defendants." Defendant, in her answer, did not deny the aforesaid allegations as to the deductions from the purchase price, but merely states that she "did not assent to or agree to the allowance or crediting of any part of the principal indebtedness or interest secured by said four trust deeds referred to in said bill of complaint upon the purchase price of said premises, nor did she assent or agree to the deduction of the principal indebtedness or the interest secured by said four trust deeds from the purchase price of said premises." The record shows that this was her position upon the trial. Nor was the aforesaid allegation in the bill that "the balance of the consideration therefor was then and there received by your orators from the said defendants" denied in defendant's answer, although the answer was filed by Attorney Porter, who was present at the consummation of the deal. Walter A. Wade, a witness for complainants and their attorney, testified that the indebtedness secured by the trust deeds described in the deed from complainants to the Luhans was credited to the Luhans on the purchase price of the property conveyed, and defendant did not cross-examine the witness upon the subject. Joseph G. Porter, present attorney for defendant and a witness for her upon the trial, testified that he was present at the time of the consummation of the deal, but he did not contradict Wade's testimony in any way. Indeed, Porter's testimony tends, rather, to corroborate that given by Wade. As to the strained argument of defendant that she was not a party to the transaction: The bill alleges that complainants sold the premises to Joseph Luhan and Bessie Luhan, and that the balance of the consideration due complainants after the aggregate amount of the indebtednesses secured by the four trust deeds had been deducted from

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the purchase price, was paid by Joseph Luhan and Bessie Luhan. In her answer defendant does not deny these allegations, but merely states that she "did not take any part personally in the purchase of the premises." She was one of the two grantees in the deed from complainants to the Luhans and she was one of the grantors in the deeds to Williams. She admits that she was present at the time of the consummation of the deal and that Porter represented Joseph Luhan, but denies that he represented her. Porter's evidence is to the effect that defendant took little part in the consummation of the deal, that she signed whatever documents her husband requested her to sign, and that she made no examination of the documents. Upon cross-examination he admitted that he acknowledged, as a notary, the signatures of the Luhans to the deeds from them to Williams. Wade testified that he was present at the time of the consummation of the deal; that Porter was the attorney for Joseph Luhan and Bessie Luhan; that he, the witness, handed the deed from complainants to the Luhans to Porter, who handed it to Joseph Luhan, who in turn handed it to Bessie Luhan; that that deed and the two deeds from the Luhans to Williams were handed to the latter by Porter with the request that he record them; that Porter at the same time turned to Mr. and Mrs. Luhan and said, "Will it be all right for Mr. Williams to take all of these deeds, * * * and record them for you?" and that it was his recollection that Mr. Luhan said, "Yes, that would be satisfactory," and that Mrs. Luhan then nodded her head in the affirmative; that Williams said that he would have to have the recording fee, and that Mr. and Mrs. Luhan then paid him the amount of the same. L. B. Williams, the grantee in the two deeds from the Luhans, testified to the signatures of Joseph and Bessie Luhan to the documents. He further testified that Mr. and Mrs. Luhan looked over the deed from complainants to them and also the deeds from themselves to

the witness, and that they asked him to record the deeds. Defendant testified that the deal was consummated at the Stock Yards Bank; that she sat seven or eight feet away from the table near which the others sat; that she does not remember whether there were any papers signed there or not; that she did not sign any deeds or papers that day but that her husband did; "He took care of everything. I depended on him. I didn't understand anything. I done what he wanted to do. I made him do it;" that if she signed any papers there it was at her husband's directions; that she did not look over any deeds, nor did anybody hand her any deeds; that nobody showed her the deed from complainants to her husband and herself; "My husband was taking care of everything;" that neither she nor her husband gave any money to Mr. Williams on that day; "I did not examine it [the deed from complainants to the Luhan]. You see my husband done all that and I took his word. He understood it. I don't even know what a deed is;" that she "didn't give the deed to Mr. Williams on that day." "Q. And you were sitting over in the corner? A. Yes. He had nothing to do with it. We had our lawyer, and my husband was there." Upon cross-examination the following occurred: "Q. You said you left everything to your lawyer. What was his name? Mr. Abraham (attorney for defendant): I object. She said she left everything to her husband. She didn't say she had any lawyer. Mr. Cullen (attorney for complainants): The record shows what she said. I will ask that the reporter read the record. (The record was read by the reporter.) Mr. Cullen: She said there 'we had our lawyer.' The Witness: I said I left everything to my husband. * * * Q. Mrs. Luhan, did your husband examine all the papers? A. I guess so, I don't know. Q. So far as you know? A. I guess so, I don't know." The witness then admitted that she signed the two Luhan deeds to Williams. Upon

redirect the following occurred: "Q. Did you read either of these deeds before you signed them? A. No sir. I never knew what I done. My husband did, but I never understood anything." In her testimony she did not deny the allegations in the bill that she and her husband purchased the property from the complainants, nor the further allegation that she and her husband paid the balance due complainants after the deductions had been made. Complainants introduced in evidence the following letter:

"WINSTON STRAWN & SHAW
First National Bank Building
Chicago

"January 12, 1932.

"In reply please refer to
No. 34591

"Re: Roy Kroeschell and W. Calvin Orth
v Edward J. Morrissey and Marie
S. Morrissey

"Mr. and Mrs. Joseph Luhan,
2310 S. Euclid Avenue,
Berwyn, Illinois.

"Dear Sir & Madam:

"We wish to advise that we represent Mr. and Mrs. Edward J. Morrissey, whom, on March 22, 1929, conveyed to you certain property in Willow Springs, Illinois, upon which there were certain mortgages, the payment of which you assumed and agreed to pay, a photostatic copy of the deed by which you acquired title to said property, is enclosed herewith.

"A judgment was today entered in favor of Roy Kroeschell and W. Calvin Orth, Municipal Court No. 1426764, against Edward J. and Marie S. Morrissey in the amount of \$3659.00, and costs. This judgment was rendered on the note secured by the Mortgage or Trust Deed on Lot 21 in Knight & Wilson's Resubdivision, etc. In addition thereto Mr. Morrissey has been required to take up the second mortgage on Lot 23 and pay the interest on the first mortgage on Lots 21 and 23.

"Demand is hereby made upon you for reimbursement to Edward J. and Marie S. Morrissey, pursuant to the terms of the deed of March 22, 1929. May we suggest that immediately upon receipt of this letter you arrange to see Mr. Wade of this office, and oblige

"Very truly yours,

"Winston Strawn & Shaw (Signed)

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Wade testified that after that letter had been sent he received a telephone call from Porter in which the latter stated that he was the attorney for Mr. and Mrs. Luhan; that the letter of January 12, 1932, had been received by them and referred to him, and that they did not recognize that they were required to make any payment; and he, Porter, suggested that Morrissey "look to a chap by the name of Williams, who had acquired title to the lots in question subsequent to the conveyance by Edward J. Morrissey and wife to Joseph Luhan and Bessie Luhan." Porter did not testify in reference to this telephone call. He was one of the attorneys who entered the appearance of the Luhans in this cause and who filed the answer of the defendant. He represents her in this court. Nowhere in his testimony does he attempt to explain why defendant, one of the grantees in the Morrissey deed and one of the grantors in the deeds to Williams, should have been kept in the dark as to the nature and contents of the said instruments. Porter, acting as attorney for both of the Luhans, in response to the letter of January 12, 1932, stated to Wade that the Luhans did not recognize that they were required to make any payments under the assumption clause, and for the Morrisseys to look to Williams. But at the time of the trial Joseph Luhan was deceased, the cause was proceeding against defendant alone, and the defense interposed was an attempt to shift all responsibility upon the deceased husband. There is no allegation in the answer and no fact or circumstance in evidence to the effect that any fraud was practiced upon defendant by anybody. The master found, inter alia, that complainants sold the premises to Joseph Luhan and Bessie Luhan and that as part of the consideration of the sale the indebtedness secured by four trust deeds was credited to the grantees on the purchase price of the premises; that defendant knew the contents of the deed from complainants to the Luhans and also knew the contents of

the two deeds from the Luhans to Williams; that Joseph Luan and defendant were represented by counsel at the time of the consummation of the deal and that the assumption clause in the deed from complainants to the Luhans was accepted and agreed to by her. The chancellor made the same findings in the decree. We are in accord with their findings.

In our view of the evidence it is entirely unnecessary for us to consider authorities cited by defendant that have no application to the facts of this case.

Under the facts as we find them there can be no doubt that the decree should be affirmed, and it is accordingly so ordered.

DECREE AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

38922

JAMES M. HARRIS,
Appellant,

v.

MELVILLE J. KOLLINER et al.,
Appellees.

APPEAL FROM SUPERIOR COURT

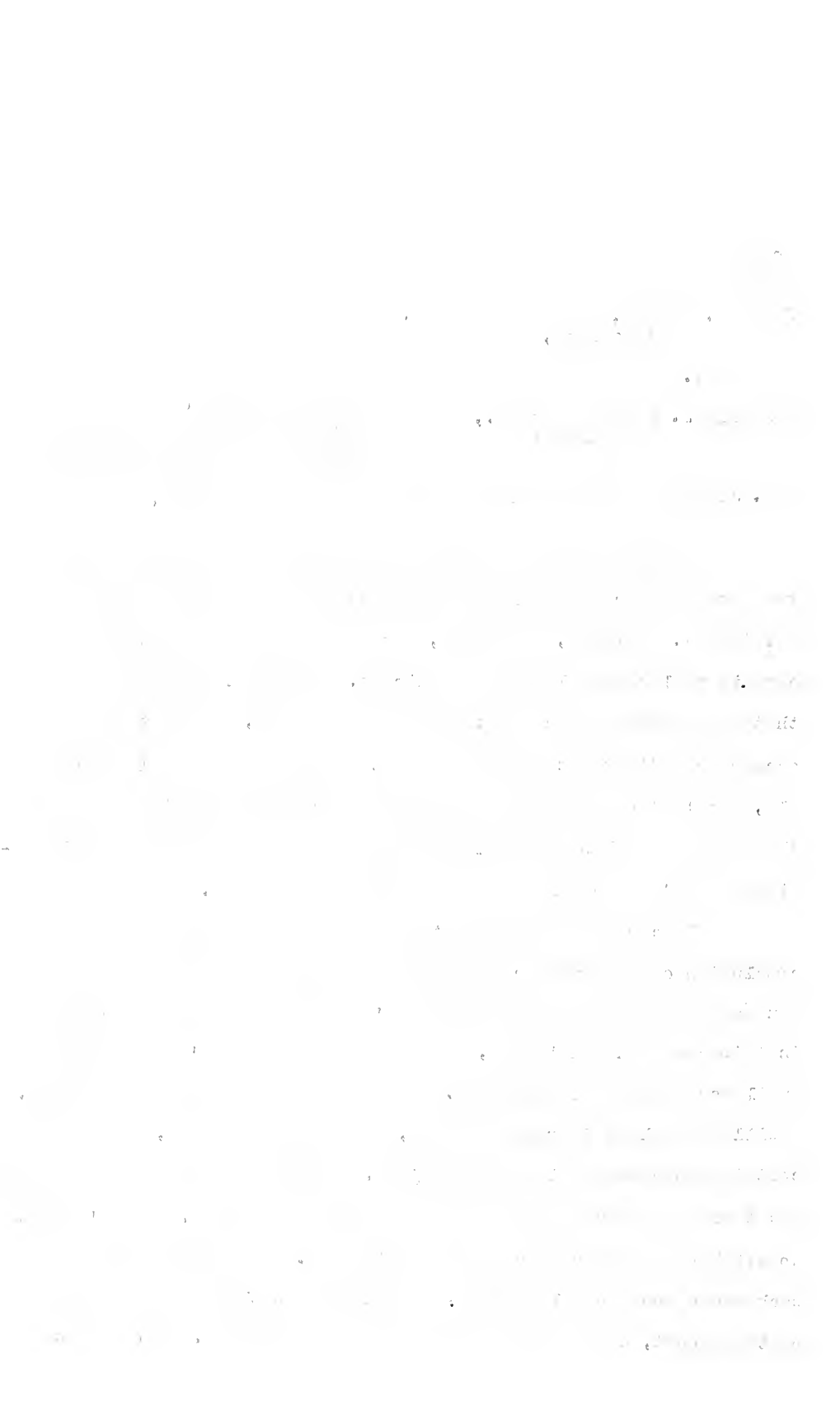
OF COOK COUNTY.

288 I.A. 626³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his complaint against defendants seeking to recover moneys paid under a contract by the terms of which Melville J. Kolliner, defendant, agreed to sell to plaintiff certain real estate located in Chicago. Plaintiff alleged that the purchase price of the property was \$19,000; that in accordance with the terms of the contract he paid a total sum of \$12,350; that defendant breached the contract in certain particulars; that there was then a mutual rescission of the contract and both parties to it "are entitled to be placed in status quo."

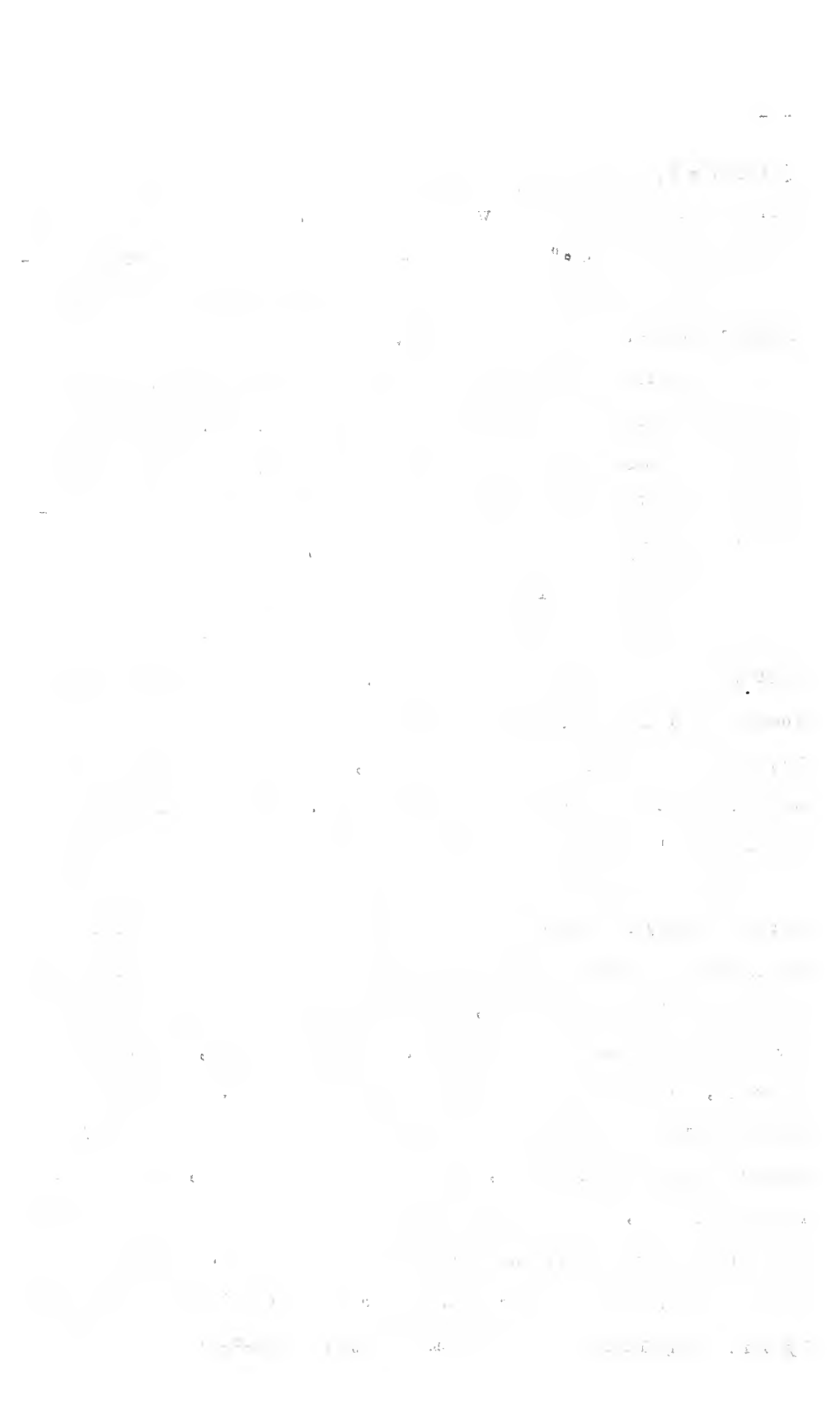
The cause was tried by the court and immediately upon the conclusion of the evidence the following occurred: "The Court: You [addressing the plaintiff] haven't any right to come in here in this court and claim \$12,000 and live in this man's house and avail yourself of his property. He is entitled to certain setoffs. I will not make a judgment for \$12,000 against this man, that is a certainty because it is highly unjust. Whether you are in an equity court or a law court you should do justice and equity. I don't want to sit here and allow you to ravish justice. I will let you go back where you properly belong, and that is in the Chancery side of this court, or I will enter a finding against you. Mr. Dotson



[attorney for plaintiff]: This cause was brought as a law action and I am convinced that is where it belongs. I will ask the Court to make its finding." The court thereupon entered a judgment finding the issues for defendants and that they recover their costs from plaintiff. Plaintiff appeals.

Plaintiff strenuously contends that the judgment entered was the result of an arbitrary and punitive action by the trial court and argues that from the evidence presented and the opinion of the trial court it is clear that the trial court was not justified in entering a judgment for defendants.

We have carefully examined the short transcript of the evidence and have reached the conclusion that justice requires that there be a retrial of this cause. It appears that the trial court was of the opinion that plaintiff was entitled to a finding but not for the full amount he claimed, and that the cause should be heard by the chancery side of the court. After an examination of plaintiff's complaint and the evidence bearing upon his claim we think that the trial court was right in his conclusion that the cause properly belonged to the chancery side of the court; but merely because the attorney for plaintiff insisted that it belonged to the law side of the court, did not justify the trial court in entering a judgment for defendants. Such a judgment, if allowed to stand, would result in a miscarriage of justice. When the court concluded that the cause belonged to the chancery side of the court he had full power, under the rules of court, to transfer it to that side, and he should have entered an order to that effect regardless of the position of counsel for plaintiff. Plaintiff complains that he is a poor man, that he has already been penalized by being compelled to appeal from an unjust judgment, and that if



the cause is reversed and remanded and then assigned to the chancery side of the court a reference to a master will practically deprive him of a reasonable opportunity to enforce his claim. It is a sufficient answer to this complaint to say that we are of the opinion, from an examination of the pleadings and the evidence, that a trial of plaintiff's claim on the chancery side of the court should not require a reference to a master. As the cause may be tried again we have purposely refrained from analyzing and commenting upon the evidence introduced.

The judgment of the Superior court of Cook county is reversed, and the cause is remanded for a new trial.

JUDGMENT REVERSED, AND CAUSE REMANDED FOR A
NEW TRIAL.

Sullivan, P. J., and Friend, J., concur.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in
the year of our Lord one thousand nine hundred and thirty-six,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

288 I.A. 627¹

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 10 1937 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A.D. 1936.

WILLIAM L. O'CONNELL, Receiver of
the Ottawa Banking and Trust
Company, etc.,

Appellant

Appeal from the Circuit Court
LaSalle County.

vs.

GEORGE ERICKSON,

Appellee.

HOFFMAN, PJ

The Ottawa Banking and Trust Company suspended business in September, 1931. At such time, two notes of appellee were in the assets of said bank. One note in the principal sum of \$400, dated August 10, 1931, payable in ninety days to the bank, with interest at six per cent. The second note, in the principal sum of \$1500, dated September 7, 1931, payable in ninety days to the bank, with interest at six per cent. The receiver after taking charge, talked to appellee about the payment of the above indebtedness. Appellee was unable to pay same and claims that he told the receiver his wife was the owner of two \$1000 first mortgage notes, secured by certain farm land in said county known as the Vermeland land, and suggested to the receiver that he give him these notes held by his wife in exchange for his notes held by the bank. The above notes were part of an issue of thirteen notes in the total sum of \$15,500, secured by a trust deed upon the Vermeland land. Subsequent to the above conversation, appellee went to the bank with his wife's notes. Finding the bank closed at that time, he went to the office of Mr. Anderson, an attorney in the city of Ottawa, and delivered these trust deed notes to him. Attorney Anderson later delivered the notes to the receiver, taking his receipt therefor. This receipt states that

the above notes had been received from the attorney, Owen Anderson, as attorney for appellee, as additional collateral to secure the obligations of appellee to said bank.

Subsequently, a foreclosure proceeding was started against the Vermeland land, under the trust deed, and the appellee was appointed receiver. This foreclosure suit never went to a decree due to the fact that the landowners, Neut Vermeland and wife, agreed to convey the mortgaged premises to a trustee for the benefit of the note-holders, and pursuant thereto did so convey the premises to appellee as trustee for said noteholders. This trust agreement bears date of March 8, 1934. It set out the interest of the various parties and listed "Jennie Erickson (appellee's wife) and William L. O'Connell, receiver of the Ottawa Banking and Trust Company of Ottawa, Illinois," as the owners of an undivided 4/31 interest. This trust agreement was executed by appellee, as trustee, on the one part, and the various parties interested, as parties of the second part. Appellee's wife, Jennie Erickson, signed the agreement as a party of the second part, and appellee, as trustee, signed as party of the first part.

On July 2, 1934, judgment by confession was entered against the appellee upon his two notes, in the Circuit Court of LaSalle County. The judgment was in favor of appellant and for the sum of \$2409.42, which included the principal and interest due on appellee's two notes. About a year later, and on April 8, 1935, appellee filed his motion in said court to open up the judgment and for leave to plead. The motion was granted and a trial ensued. Appellee's contention upon the trial was that the receiver had agreed with him that he would accept the two mortgage notes held by his wife on the Vermeland land, as payment of appellee's notes, and would return appellee's notes to him in exchange for the notes of his wife. The appellee therefore claimed that he did not owe the appellant anything upon his notes which had been put in judgment, and that they had been fully satisfied and discharged by the delivery of the aforesaid notes of his wife. The jury found in favor of appellee and appellant prosecutes this appeal from the judgment thereon.

It is the contention of appellee that the receiver agreed to deliver to him his two notes in exchange for the two notes belonging to his wife. Delivery of the wife's notes was made by appellee's attorney at a time subsequent to the agreement appellee claims to have had with the receiver. No delivery of appellee's notes was made by the receiver to either appellee's attorney or to appellee, but instead, the receiver delivered to appellee's attorney a receipt for said notes, which states in positive language that they were received as collateral to secure appellee's obligations at the bank. This was in December, 1931. The matter ran along until March 8, 1934, when appellee became trustee for the Vermeland lands upon which his wife's notes were a lien by virtue of the trust deed. There is no evidence that he took any steps to obtain his notes from the receiver. His wife signed this trust agreement for the interest in the premises as evidenced by the two \$1000 notes which she had given to her husband, and which he had caused to be delivered to the receiver, as owning same together with the receiver of said bank. Appellee and his wife being parties to this agreement, are chargeable with notice of its contents, and the results that would naturally flow therefrom. Appellee states that he read it.

On May 31, 1932, the receiver wrote appellee regarding payment of both his \$400 note and his \$1500 note. Again on August 15, 1932, and on January 30, 1933, he wrote appellee. It does not appear that appellee made any response to these letters or went to the receiver and made any demand for his notes, in lieu of his wife's notes which he had turned over to the receiver on December 30, 1931. On April 3, 1934, the receiver wrote appellee requesting that he and his wife come in and execute papers necessary for the assignment of their interest in the Vermeland property, to the bank. Following this, and on September 29, 1934, they went to Ottawa and there executed and delivered their conveyance to appellant as receiver quit claiming all their right in the Vermeland land by virtue of the trust deed thereon.

A court is not at liberty to infer facts not proven, yet it is at liberty to draw all the inferences which logically and naturally flow from the facts proven. The conduct of appellee is so inconsistent with the agreement he claims to have had with the receiver, that one cannot reconcile them. During the trial and in the presence of the jury, remarks by counsel for appellee were made, which could not have been otherwise than inflammatory in their nature. One of such remarks was made with reference to the interest appellant was holding in the Vermeland land by virtue of its assignment from appellee's wife of her participating interest in the trust deed, as security for appellee's notes. In this respect and in referring to the interest in the Vermeland mortgage held by appellant, the attorney stated, "We have a right to show the value of the land and the improvements on it, and what they got, and that they kept it, and they kept it to their own use; converted it to their own use, and kept it, and never offered to give them a damn cent back, and never intended to. And he has parted with everything that he and his wife had." The appellee is trustee of the land under the trust agreement. It will sometime have to be liquidated and no doubt the mortgage proceeding was abandoned in the manner in which it was, in order to permit Mr. Vermeland time in which to procure a new loan, or in the hopes that land values might increase. Appellee stated in his testimony with reference to his own notes, that he had no money and could not borrow any money. Appellant holds his notes and his wife's interest in the Vermeland mortgage, which it admits it holds as collateral security to appellee's notes. We are of the opinion that the verdict in this case was against the manifest weight of the evidence. The judgment entered thereon is therefore erroneous. The judgment is reversed and the cause remanded.

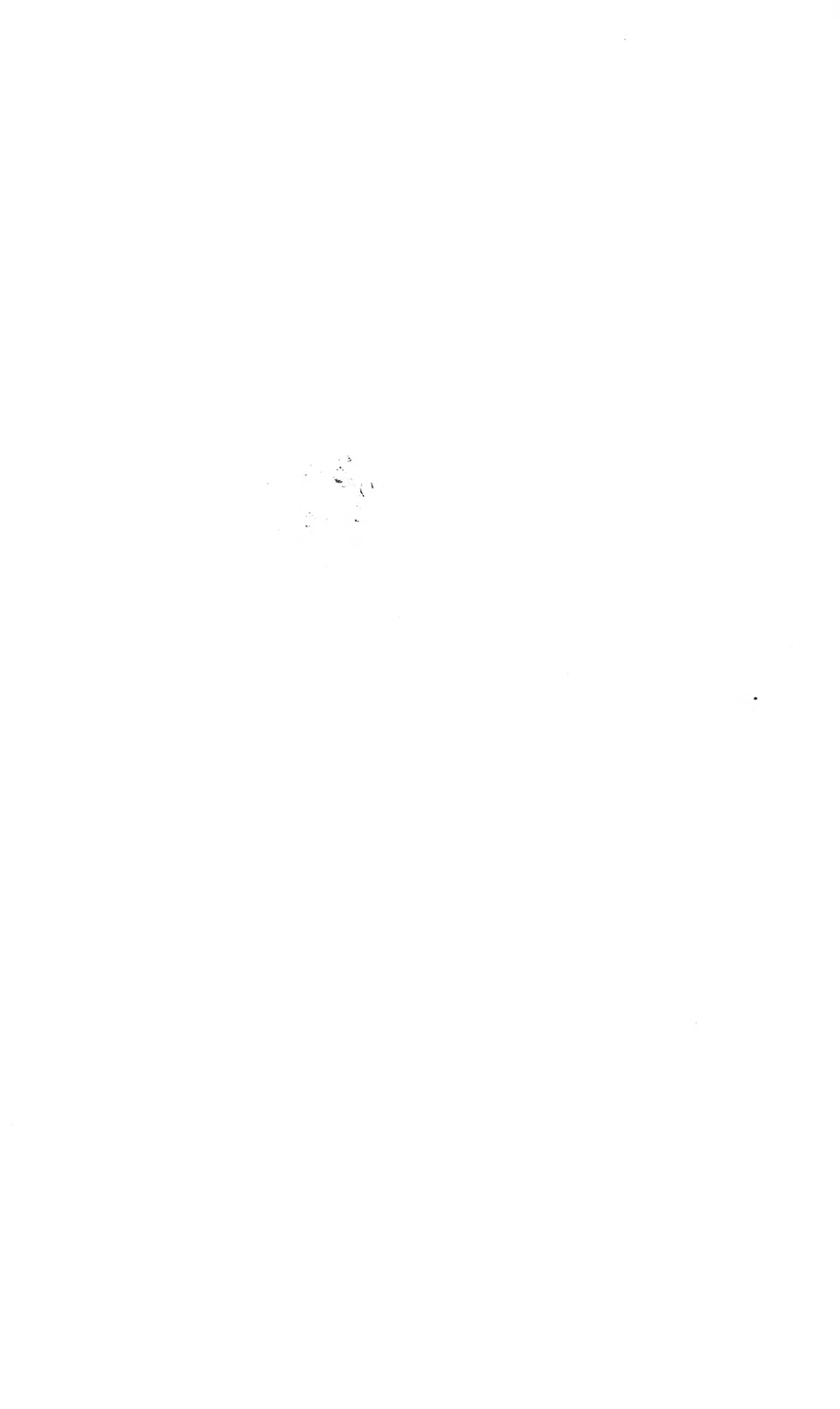
Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT }ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court



~~211~~

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in
the year of our Lord one thousand nine hundred and thirty-six,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. PESPER, Sheriff.

288 I.A. 627²

BE IT REMEMBERED, that afterwards, to-wit: On
the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1936.

George W. Pyott,

Appellee,

Appeal from the County Court

vs.

of McHenry County

Samuel Kahn,

Appellant,

HUFFMAN-P.J.

This was a trial of the rights of property. Appellant recovered a judgment against the Pyott Sand and Gravel Company, a corporation, and James M. Pyott, on August 22, 1935, in the sum of \$6245.61. Execution issued thereon and the sheriff levied upon certain rails and equipment located at a gravel pit which had been operated by said defendants. Appellee filed notice of claim with the sheriff, to the property levied upon, and trial was had before the Judge of the County Court of McHenry County. The court found in favor of the claimant (appellee), and entered judgment accordingly. Appellant brings this appeal.

Appellee claims that James M. Pyott was the sole surviving stockholder of the Pyott Sand and Gravel Company, and that as such, he conveyed the property involved herein, by bill of sale, to appellee, under date of August 2, 1935, as part payment upon rent for the lands upon which the Pyott Gravel Company had operated. The lands belonged to appellee. In support of this contention, appellee claims that the corporation had been legally dissolved for more than three years prior to the day upon which appellant recovered his judgment, and that by virtue of Sec. 94, ch. 32, Ill. St. S.H. Sec. 157.94; 1935, the appellant's judgment recovered below was void because suit was not begun within two years after date of dissolution. Appellee, by his brief, states that this is his contention with respect to this case.

We do not find any competent evidence in the record tending to prove that James M. Pyott was the sole surviving stockholder of the corporation, nor do we find any evidence tending to prove the dissolution of said corporation as claimed by appellee. Appellee has filed his motion in this court to amend and supplement the record, by the introduction of documentary evidence, that was not introduced at the time of the trial, and not a part of the record at the time of final judgment, nor at the time of appeal. We are not disposed to grant such motion. Furthermore, it is not filed in compliance with rule 12 of this court, to the effect that all motions when not based on matter appearing of record, shall be supported by affidavit. The motion of appellee to supplement the record by the documentary evidence offered, is denied.

The judgment of the County Court is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, }
 } ss.

SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

254

AT A TERM OF THE APPELLATE COURT,
Begun and held at Ottawa, on Tuesday, the sixth day of October, in
the year of our Lord one thousand nine hundred and thirty-six,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. TESPER, Sheriff.

288 I.A. 627³

BE IT REMEMBERED, that afterwards, to-wit: On
JAN 16 1937 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

OCTOBER TERM, A. D. 1936

NETTIE WHITE,

Appellant

vs.

Appeal from the Circuit Court
Winnebago County

FIDELITY MUTUAL BENEFIT
ASSOCIATION,

Appellee.

HUFFMAN - P.J.

This was a suit by appellant to recover upon a benefit certificate issued to her husband by appellee association. Appellee is a mutual benefit association such as provided for under Sec. 435 et seq., ch. 75, Ill. St. 1935, Sec. 516, ch. 33, S-H St. 1935.

Section 14 of the policy provided among other things that "Should the member die or death be caused, directly or indirectly, from any of the following diseases or causes, either acute or chronic, within twelve months from the date of this certificate or from date of reinstatement; from any organic trouble or trouble thereof, bacterial trouble,**** the association will pay only one-fifth of the amount which would otherwise be payable under the terms of the certificate." The certificate issued to the member on March 14, 1935. He died from lobar pneumonia on June 6, 1935. Appellee association took the position that the cause of death was a bacterial trouble and that by the provisions of said paragraph 14 of the certificate, the appellee was bound to pay only one-fifth of the amount which would otherwise be payable. The certificate provided that during the first one hundred eighty days the total

amount payable thereunder was the sum of \$200. Appellee tendered appellant \$40, which was one-fifth of this amount, the tender being made by virtue of the provisions of paragraph 14. Appellant refused the tender and this suit resulted.

Upon the trial, appellee by its witness Dr. Roseborough, introduced testimony to the effect that lobar pneumonia is a bacterial trouble, and that the germ or pneumococcus is a form of bacteria. There was no evidence offered by appellant tending in any way to refute this testimony. It stands in the record uncontradicted. It therefore appears that pneumonia is an infectious disease, caused by the pneumococcus; that the pneumococcus is a bacterium; and hence, that lobar pneumonia is a bacterial disease. Two witnesses testified for appellant - herself and Dr. Moore, who stated that the deceased died from lobar pneumonia. Dr. Roseborough was the only witness on behalf of appellee. His testimony is as above indicated. Under the state of the evidence, the trial court could not do other than render the judgment entered, finding that appellant was entitled to have and receive from appellee the sum of \$40.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in
the year of our Lord one thousand nine hundred and thirty-six,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

283 I.A. 627⁴

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1936

Harold Cadman,

Appellant

vs.

Appeal from Circuit Court

School Directors of School
District No. 14, Winnebago
County, Illinois,

Winnebago County

Appellees.

HUFFMAN - P.J.

Appellant was employed by the directors of appellee school district to teach in a country school. His contract covered a period of nine months commencing with September 3, 1935. He continued to teach under this contract of employment until March 7, 1936, when his services were terminated by the board of directors on the ground of incompetency and negligence. Following such dismissal, appellant brought this suit against the district for \$210 which he claims is the balance due him under his contract for the last three months of the term during which he was not permitted to teach. The cause was heard before the court and judgment rendered in favor of the defendant district.

The contract of employment between the parties, among other things, provided that the teacher might be dismissed by the directors for incompetency, negligence, and a number of other things therein set out. This power is granted the board of directors by statute. Sec. 123, ch 122, S-H; Ill. St.; 1935. The school directors have this right notwithstanding the teacher may have been employed for a definite period of time. School Directors v. Reddick, 77 Ill. 628.

We have carefully examined the evidence in this case and are not disposed to disturb the finding^{of}/the court. It was within the province of the trial court, acting in the place of a jury, to weigh and determine the credibility of the evidence offered. The evidence discloses among other things, that appellant was late in arriving at the school and on many occasions did not arrive until after the school hour had commenced; that he would leave the building during school hours, for extended periods of time; that he would eat during school hours and permit the children to do so; that lessons were not regularly assigned and in some instances a period of two or three weeks would elapse between the assignment of a lesson and the recitation thereon; that he brought a snake to school which he permitted to curl about his face and head during the school hours; that during school hours he would perform experiments with explosives, demonstrating to the children their various characteristics; that he gave a lesson in shorthand; that he would crack cocoanuts during ~~the~~ school hours; drink the milk therefrom and then pass the same around for the delectation of the students; and that he would play checkers with the students during school hours. Although it might be said that the above things were harmless in their nature, yet they were not consistent with the purposes for which he was employed.

The judgment of the trial court is affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. JESPER, Sheriff.

283 I.A. 627⁵

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 18 1937 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IN THE APPELLATE COURT OF ILLINOIS,
SECOND DISTRICT
OCTOBER TERM, A. D. 1936

ROSS ANDREWS,

Appellant

vs.

APPEAL FROM CITY COURT OF ELGIN

J. S. LAWRENCE,

Appellee.

HUFFMAN - P.J.

This is an appeal prosecuted from the city court of Elgin. Appellant brought suit against appellee in said court, to the January term, 1933, thereof. Due legal service was had on appellee more than ten days before the first day of said term. Appellant filed no declaration to the January term of said court, nor to the following March term thereof. Subsequently, and on May 4, 1933, appellant (plaintiff below), filed his declaration in said cause, and on October 6, 1933, without notice to appellee or his attorneys, appellant caused appellee (defendant below) to be defaulted and a judgment in damages entered against him in the sum of \$10,000.

Appellee did not know anything about the judgment until December 19, 1935, when execution was served on him, whereupon he instituted this proceeding under Paragraph 72 of the Practice Act, to correct errors of fact. The trial court after hearing the cause, set aside the order of default entered against appellee in October, 1933, vacated the judgment and quashed the execution issued thereunder. Judgment was entered in favor of appellee and against appellant as in case of involuntary non-suit, and appellant's case below was thereupon dismissed. It is from the above action of the court that appellant prosecutes this appeal.

Where a defendant is served with summons ten days before the term of court, and no declaration is filed until after the commencement of the next succeeding term, the defendant under the circumstances, ~~if~~ cannot be considered as being in default, and it is error to render a judgment by default against him. *Moody v. Thomas*, 78 Ill. 374. Under such circumstances, a defendant is not by law required to plead, and if he is not required to plead, he cannot be said to be in default for not doing so. This court passed directly upon this question in *Garnsey v. Schwartz*, 154 Ill. App. 154. Where the declaration is not filed ten days before the second term of the court, the defendant is entitled to judgment as in case of non-suit. *Garnsey v. Schwartz*, supra., p. 153; *Fish v. Regez*, 46 Ill. App. 428; *Staley v. Illinois Threshermen's Mut. Ins. Co.*, 246 Ill. App. 279. A defendant does not waive his right to have the action dismissed because of delay in making such motion. *Ruedger v. Toledo, P. & W. Ry. Co.* 247 Ill. App. 388, 391.

It does not appear from the record that appellee did anything to deprive him of the right to file his motion and to move to dismiss the suit because the declaration was not filed within the time provided by statute. It will be observed that this suit was brought under the former Practice Act of this state, and what is said herein is based upon the statute as it then existed.

The judgment of the city court is affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hercunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

1110.
AT A TERM OF THE AFFILIATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in
the year of our Lord one thousand nine hundred and thirty-six,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

288 I.A. 628'

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 18 1937

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1936

Raymond Pregonzer,
Appellee

vs.

Appeal from the
Circuit Court
of Lake County.

Lillian A. Rothers, as Administratrix
with the Will annexed of the Estate of
Louis A. Rothers, Deceased, and as
Trustee under the Last Will and Testament
of Louis A. Rothers, Deceased, for the
Benefit of Gertrude Osmond, Louise
Rothers and Charles Rothers,
Appellant.

DOVE, J.

On July 8th, 1925 Michael E. Smith and wife executed a note for \$7,000.00, payable to the order of August Panknin and Grace Panknin five years after date, with six per cent interest. The payment of this note was secured by a mortgage on certain premises in Lake County and for a valuable consideration the note and mortgage were sold and assigned on January 7, 1928 by the payees and mortgagees to Raymond Pregonzer, the plaintiff herein, and the assignment thereof was duly filed for record at that time. At the time Pregonzer purchased these securities, he and Louis A. Rothers were partners engaged in the business of contracting, dredging and grading land. Their association as partners beganⁱⁿ 1925 and continued until April 25, 1928, at which time Mr. Rothers died. During the course of the partnership, Pregonzer and Rothers did considerable dredging work for the said Michael E. Smith upon the land which Smith and his wife had mortgaged to Panknin on July 8, 1925. In payment for said work, Smith and his wife in 1927 and in 1928 executed two other notes, one for

\$8550.00 and the other for \$5179.10 and to secure their payment executed a second and third mortgage or trust deed upon the same premises covered by the mortgage of July 8, 1925. Upon the death of Louis A. Rothers, his widow, Lillian A. Rothers was appointed administratrix with the will annexed of his estate and trustee under the provisions of his will.

On June 10, 1935 the instant complaint was filed by Pregonzer, which averred, among other things, that he, Pregonzer, was the owner of the \$7,000.00 note and first mortgage to secure its payment and also the owner of an undivided one-half interest in the said notes of \$8550.00 and \$5179.10 respectively and the mortgages or trust deeds given to secure their payment. That the other one-half interest in the said notes of \$8550.00 and \$5179.10 and the trust deeds to secure their payment belonged to Louis A. Rothers in his lifetime. The complaint then alleged his death and heirship and asked that a decree be entered finding the amount due the plaintiff upon his note of \$7,000.00 and that the mortgage given to secure its payment be decreed to be a first lien upon said premises and for foreclosure and sale of the mortgaged premises. Lillian A. Rothers, individually and as administratrix, answered the complaint and filed a counter claim in which she neither admitted nor denied that the plaintiff was the sole owner of the first lien upon said premises but did admit that the plaintiff was the owner of an undivided one-half interest in the notes and junior trust deeds. In her answer and counter claim she alleged that at the time the plaintiff acquired the first mortgage which he now seeks to foreclose, the plaintiff and her deceased husband were partners and as partners they acquired the junior liens upon said premises, that upon the death of Louis A. Rothers, the plaintiff became trustee of the assets of the partnership for the benefit of the widow and children of Rothers, that the plaintiff seeks to foreclose and forever bar said widow and children of said deceased partner of their interests in said land and prayed that said first mortgage be decreed to be a partnership asset.

After the issues were made up, the cause was referred to the Master, who took the evidence and found therefrom that the plaintiff

purchased with his own funds, on January 7, 1928, the \$7,000.00 note and first mortgage given to secure its payment, that Louis A. Rothers, or no one for him, contributed anything toward the purchase of said note or mortgage, that the plaintiff and Lillian A. Rothers, as administratrix, etc., each owned a one-half interest in the \$3550.00 note and the \$5179.10 note, together with the second and third trust deeds which were given to secure their payment, that their interest, by virtue of said ownership is subject and subordinate to the rights of the plaintiff and that the mortgage of the plaintiff is a first and superior lien upon the property described in the mortgage. The Master, therefore, recommended that a decree of foreclosure and sale be entered in favor of the plaintiff. Thereafter exceptions to the report of the Master were overruled and a decree of foreclosure and sale was rendered as recommended by the Master and from that decree this appeal has been prosecuted.

There is no conflict in the evidence in this record. The facts are as the Master found. Appellant concedes that the \$7,000.00 note secured by a first mortgage upon the premises therein described was purchased by appellee with his own money and not with partnership funds or assets. As we understand appellant's contention, however, it is that because appellee and appellant's husband were then partners and held junior liens upon the same premises described in the mortgage which appellee purchased, it then became the duty of appellee to so advise appellant's husband of his purchase, and inasmuch as the evidence discloses that he did not do so, that then appellee occupies the position of a partner who buys an outstanding adverse title to property belonging to the firm and having acquired such interest without his copartners consent, such purchase will be deemed to be for the benefit of the firm and applying this principle in the instant case it is insisted that the trial court erred in not decreeing that appellee held this \$7,000.00 note and first mortgage as an asset of the partnership. In support of this contention, counsel for appellant call our attention to text writers who say and cases which hold that a partner cannot derive

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any benefit from the partnership relationship for himself alone as against his copartners. Of course this is the law and likewise it is the law that one partner cannot practice fraud and misrepresentation upon his copartner and divert the property or assets of the firm to his individual use without being compelled to restore that which he has so diverted. These general legal principles are not applicable, however, to the facts in this record. In the instant case partnership funds were not used to buy the mortgage foreclosed herein, nor was the purchase of that mortgage made for partnership purposes. The mere fact that appellee and appellant's deceased husband were partners in the dredging business would not preclude appellee from buying with his own funds the first lien upon the premises upon which the partners held junior encumbrances. By the purchase of the first lien, appellee stepped into the place then held by the owners of said first lien, August and Grace Panknin. The fee to the mortgaged premises was at all times owned by Michael E. Smith and wife. All that the partnership owed were junior liens thereon. By the purchase of the first lien by appellee, no change of priorities in the mortgage indebtedness took place and the rights or interests of the partnership were in no way affected. The mere fact that a partnership existed between appellee and appellant's deceased husband did not make this note and first mortgage which appellee purchased with his own funds partnership property. *Tsanos v. Tsanos*, 313 Ill. 499.

In our opinion there is no merit in appellant's contention. The Chancellor entered the only decree warranted by the undisputed facts as found in this record and that decree will be affirmed.

DECREE AFFIRMED.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in
the year of our Lord one thousand nine hundred and thirty-six,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. RESPER, Sheriff. 283 I.A. 628²

BE IT REMEMBERED, that afterwards, to-wit: On
JAN 10 1937 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1936

Vito Buffa, Administrator of the
Estate of Franklin Donald Buffa,
Deceased,

Appellant

Appeal from the Circuit
Court of Winnebago County.

vs.

Louis Blank,

Appellee.

DOVE, J.

This is a suit instituted by the father of Franklin Donald Buffa, as the administrator of his estate, to recover damages for his alleged wrongful death. At the close of all the evidence offered on behalf of the plaintiff, the jury, in obedience to a peremptory instruction, returned a verdict finding the defendant not guilty. Upon this verdict judgment was rendered and the record is brought to this court for review.

The complaint averred that on December 15th, 1935 Franklin Donald Buffa was riding his bicycle in a northerly direction along a public highway known as North Second Street Road about a mile south of the Wisconsin-Illinois State line, that at this time Franklin was a boy twelve years of age and in the exercise of due care and caution for his own safety and the safety of his bicycle, that at the time and place aforesaid, the defendant was driving his automobile also in a northerly direction upon said highway, that the defendant could and did see plaintiff's intestate upon the highway and by the exercise of reasonable care could have avoided colliding with the bicycle upon which plaintiff's intestate was riding, that it was his duty to so operate his automobile so as not to injure Franklin Donald Buffa, that notwithstanding such duty, he so negligently and carelessly

1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes that proper record-keeping is essential for transparency and accountability, particularly in financial matters. The text outlines various methods for collecting and organizing data, ensuring that all relevant information is captured and stored systematically.

2. The second part of the document focuses on the analysis and interpretation of the collected data. It describes how to identify trends, patterns, and anomalies within the dataset. This section highlights the need for critical thinking and the application of statistical tools to draw meaningful conclusions from the information. It also discusses the importance of cross-verifying data from different sources to ensure its reliability.

3. The third part of the document addresses the communication of findings. It provides guidance on how to present the results of the analysis in a clear, concise, and accessible manner. This includes the use of tables, charts, and graphs to visualize complex data. The text also stresses the importance of providing context and explaining the significance of the findings to the intended audience.

4. The final part of the document discusses the ongoing nature of the process. It notes that data collection and analysis are not one-time tasks but rather continuous processes that require regular updates and revisions. It encourages a proactive approach to monitoring and evaluating the system, ensuring that it remains effective and responsive to changing circumstances.

drove and managed his automobile that it ran against the bicycle upon which Franklin Donald was riding, throwing the rider upon the road and as the proximate result thereof plaintiff's intestate shortly thereafter died. The bill of particulars filed by the plaintiff stated that the defendant, at the time and place mentioned in the complaint, saw the plaintiff's intestate on the bicycle at a considerable distance before the collision, that the defendant was travelling at a high rate of speed, that as the defendant started to pass plaintiff's intestate, he did not sound his automobile horn, that defendant had been drinking intoxicating liquor, that he did not allow sufficient room in which to pass the bicycle and failed to keep his automobile under control.

The answer of the defendant admitted that plaintiff's intestate was a boy twelve years of age and that at the time and place in question he was riding his bicycle in a northerly direction, admitted that at some distance behind him, he, the defendant, was ^{driving} driving his automobile also in a northerly direction, and admitted that at a certain time he did see plaintiff's intestate upon said highway. By his answer, however, he denied that plaintiff's intestate was, at the time and place in question, in the exercise of due care and caution for his own safety and the safety of his bicycle, and denies that he, the defendant, as he was driving his automobile along said road, operated his automobile carelessly or was guilty of any negligence or want of any reasonable care and averred that it was the duty of plaintiff's intestate to so manage and control his bicycle so that it would not run into the automobile being driven by defendant.

During the night of December 14, 1935 it had snowed some and rained during the early morning of the 15th, the pavement was icy. The plaintiff called the defendant for cross examination under the Practice Act and he testified that he lived in Rochelle, Illinois, and on the morning of December 15th, he was driving his automobile on North Second Street highway a mile or two south of Beloit, and that the car he was driving struck plaintiff's intestate. Herman Stoll testified that on December 15, 1935 he lived on a dairy farm

two miles south of Beloit and delivered milk to Beloit, that about 6:45 A.M. of that day he came upon the highway about one mile south of where the accident occurred and drove north, that when he ~~sigg~~ arrived at the place where the accident had occurred, a lady signalled him to stop and he did and saw a young man and this lady there. At that time plaintiff's intestate was lying on the ground forty-five or fifty feet north of a mail box, his head was facing northeast and was a foot or eighteen inches east of the edge of the pavement, the bicycle was ten or twelve feet north of the mail box and about eight feet east of the edge of the pavement. This witness and the young man picked up the boy, who was unconscious, and this witness took him to the hospital. About noon that day this witness returned to the scene of the accident and found some blood stains on the ground where the body of plaintiff's intestate was picked up by the witness earlier in the day. Charles Erickson testified that he was a police officer in Beloit and went to the scene of the accident with Otto Reichard, another police officer, about 2:30 in the afternoon of December 15, 1935, that he observed blood in the snow about thirty-five feet north of the mail box on the east side of the highway about two or three feet east of the edge of the pavement, looked around for a distance of one hundred feet on both sides of the pavement but found no other blood stains. This witness and also Mr. Reichard, both testified that they observed bicycle marks about three feet east of the east edge of the pavement and fifteen feet north of the mail box and also observed automobile tire tracks which led from the west side of the pavement northwest about one hundred fifty feet to a telephone pole, which had been cracked almost off toward the bottom. Howard Moffit testified that North Second Street Road was also known as Route One, that it is an eighteen foot concrete pavement with a black line drawn down the center, that he lived on this Route one quarter of a mile from where the accident occurred. He further testified that "a fellow that was with Louis Block, the defendant, knocked at the door of my house and he, the witness, drove to the scene of the

accident, which happened about the middle of a hill, one-half mile south of the Wisconsin-Illinois line. This witness identified some photographs which were taken on April 20th, 1936 as correct representations of the highway and surroundings, except that the pavement was icy on the morning of December 15, 1935. These photographs were offered and received in evidence without objection. This witness further testified that as he drove from his home to the scene of the accident he observed the defendant's car on the west side of the highway heading south with the right front fender against a telephone pole. "That the tracks of the automobile from where the car was led southeast about fifty feet to where it came off the highway. The marks were a little wider than ordinary tire marks like a car was sliding. The right front fender of the car was smashed and the clutch had jumped out of place. Besides Louis Blank I saw two women and a boy in the car. The defendant said he had hit a child, Franklin Donald Buffa, with the car. On the east side of the highway I saw the bicycle the boy was hit on and a pool of blood on the pavement. The bicycle was twelve to fifteen feet north of the mail box shown in Plaintiff's Exhibit 2, on the east side of the highway, and two or three feet off the pavement. The pool of blood was about thirty-five feet north of the bicycle, and two feet east of the edge of the pavement. It was a foot or foot and a half square. I didn't notice any other blood at any other point. * * * The bicycle was twelve to fifteen feet north of the mail box on the east side of the highway. The pool of blood was also on the east side of the highway about thirty-five feet north of the bicycle. I drove Mr. Blank to the hospital in my car. He sat in the same seat with me. It was a closed car. The windows were closed. I didn't notice anything in my car. After I took him to the hospital I picked him up again in my wrecker. He sat next to me. I could smell liquor. Mr. Blank sat the closest to me." On cross-examination this witness testified: "I rode about two miles with Mr. Blank from the scene of the accident in my car to the hospital. He was ~~xxxx~~ alone in the front seat with me. After that I came back to the hospital in the wrecker and Mr.

Blank and a young man rode with me in the wrecker. This was one-half to three-quarters of an hour after the accident. Mr. Blank was not in an intoxicated condition. I didn't notice whether he gave any indication of being under the influence of liquor. The first time I was conscious of smelling liquor was after I picked up Mr. Blank at the hospital. The pool of blood was on the shoulder, two feet east of the edge of the pavement. I didn't see the boy lying on the pavement. He had been taken in a truck before I got there. The Blank car was on the west side of the highway off the pavement in a ditch facing in a south/easterly direction with its right front fender against the telephone post. There was quite a bit of snow on the ground. The tire marks showed in the snow on the side. I didn't notice any mark on the cement highway. The boy's bicycle was lying on the shoulder on the east side of the pavement three or four feet east of the edge of the pavement." The foregoing is all the evidence found in this record except the testimony of Dr. Brinkerhoff, who testified that he attended plaintiff's intestate at the hospital, in Beloit about eight or eighty-thirty o'clock the morning of the accident. His examination disclosed that the deceased was bleeding from the nose and mouth, was unconscious and had suffered a skull fracture, from which he died the same afternoon.

Counsel for appellant insist that the evidence discloses three distinct negligent acts of the defendant: first, operation of his automobile at a ~~dangerous~~ dangerous rate of speed under the icy and slippery conditions of the highway; second, a violation of the statute forbidding the passing of another vehicle when approaching the crest of a hill and third, the failure of defendant to have his automobile under proper control while approaching another vehicle going in the same direction. The pleadings and the evidence discloses that appellee's car struck the bicycle upon which appellant's intestate was riding but there is no evidence in the record as to where the collision took place, except about the middle of the grade or hill. The bicycle after the accident, so the evidence discloses, was eight

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feet east of the east edge of the pavement and the body of appellee's intestate was found thirty or more feet north of the bicycle and appellee's automobile travelled on hundred and fifty feet off of the pavement on the west side thereof before it stopped against a telephone post and from the positions of the bicycle, the body and appellee's car, counsel argue that the speed of the automobile must have been unreasonable. We do not believe that this inference must necessarily be drawn from these facts. Just what a driver of an automobile might or might not do when driving along a slippery, icy pavement when he observes a bicyclist ahead of him is a matter of conjecture. He might use his brakes and his brakexs would probably prove unavailing. From the physical positions of the automobile, the injured boy and his bicycle, a court would not be justified in presuming that appellee was negligent and then base upon that presumption a further one that such negligence was the proximate cause of the accident. "Liability cannot rest upon imagination, speculation or conjecture nor upon the choice between two views equally compatible with the evidence, but must be based upon facts established by evidence firmly tending to prove them." Burns v. Chicago and Alton Railroad Co., 223 Ill. App. 439.

Furthermore, there is no evidence in this record which sustains appellant's averment in his complaint that his intestate was in the exercise of ~~extra~~ due care and caution prior to and at the time of the accident. His counsel again call the court's attention to the position of appellee's car, the bicycle and the body of appellant's intestate after the accident and argue that from these facts it is evident that the deceased must have been riding his bicycle on the east side of the pavement and since he was riding on the right side of the road, he was therefore in the exercise of due care for his own safety. We do not think either of these conclusions necessarily arise from the positions of the automobile, bicycle or the body of appellant's intestate after the accident, whether the deceased turned his bicycle into the path of the approaching automobile or stopped,

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or his bicycle slipped and he fell or that his bicycle exhibited a red light to the rear does not appear from the evidence. Due care on the part of the deceased must have been proven. There were eye witnesses to this accident who could have been called to testify. A plaintiff is not permitted to establish a death as a result of an accident and then rely upon the instinct of self preservation common to all to establish the exercise of due care and caution on the part of the deceased and in our opinion appellant having failed to prove this material averment of his declaration, the trial court very properly instructed a verdict for appellee. The judgment will be affirmed.

JUDGMENT AFFIRMED.

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STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in
the year of our Lord one thousand nine hundred and thirty-six,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. RESPER, Sheriff.

283 I.A. 628³

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 10 1937 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1936

Kathryn Erickson, by Thorsten
Erickson, her father and next
friend, and Thorsten Erickson,

Appellees

vs.

Appeal from the Circuit
Court of Winnebago County

Central Illinois Electric and
Gas Co., a corporation,

Appellant.

DOVE, J.

On May 9, 1934, Kathryn Erickson, a girl ten and one-half years old, was riding a bicycle, proceeding north on London Street, in the City of Rockford, Illinois. London Street runs north and south and into Rural Street but ends at the intersection and does not extend north beyond the north side of Rural Street. Rural Street extends east and west from this intersection. The Central Illinois Electric and Gas Company operates a bus line in said city and on the day in question a bus belonging to it was proceeding east along the south side of Rural Street. It stopped at the southwest corner of the intersection and discharged passengers. It then proceeded east across the intersection, near the south line of Rural Street. As it reached the east side of the intersection, Kathryn came up from the south, riding her bicycle very slowly and there was a collision as a result of which Kathryn was injured. To recover for the injuries she suffered and for the expense incurred by her father in caring for her, this suit was instituted, resulting in a verdict for her, in the sum of \$8,000.00, and one in favor of her father in the sum of \$770.00. The trial court ~~required a remittitur of \$500.00 from her, which was filed and there-
upon judgments for \$7500.00 in her favor and for \$770.00 in her father's~~

rendered judgments upon these verdicts

~~favor was rendered~~ and the record is brought to this court for review.

The accident occurred about four o'clock in the afternoon of May 9, 1934, the sun was shining, the pavement was dry and the regular route of the bus was from the west toward the east on Rural Street. As the bus proceeded across the intersection and as it reached the east side of London Street, it was going about ten miles per hour and there was no automobile or traffic in any direction from the intersection, except the bus and the bicycle which Kathryn was riding. According to the testimony of Kathryn, she turned into Rural Street about four feet ahead of the bus and was riding in Rural Street close to the curb, that the bus was back of her and as she was riding along the bus crowded her toward the curb and before she knew it, she had tipped over. Her testimony that she turned into Rural Street in front of the bus and that the bus crowded her toward the curb is not corroborated by any witness or by any facts or circumstances in evidence. The testimony of the passengers on the bus and other witnesses was to the effect that the front end of the bus had already passed out of the east side of the intersection prior to the time Kathryn arrived at the corner on her bicycle and when she turned the corner she did so just in front of the rear wheels of the bus and ran her bicycle into the side of the bus. As the judgment must be reversed, we will not set forth in this opinion a resume of all the testimony, but we have read the evidence as the same appears in the abstract and are inclined to the opinion that the verdict is manifestly against the weight of the evidence.

The sixth instruction tendered by appellee and given by the court is as follows: "The court instructs the jury that if you believe from a preponderance of the evidence that the defendant, by its servant, in the exercise of reasonable and ordinary care, could and should have avoided the accident in question, and if you further believe from a preponderance of the evidence that, at the time and immediately before the accident, the plaintiff Kathryn Erickson, was in the exercise of such care and caution as an ordinarily prudent girl

of her age, intelligence, capacity and experience would exercise under the circumstances as shown by the evidence, then your verdict should be for the plaintiff." This instruction directs a verdict and in our opinion should not have been given. The charge of negligence in the complaint was most general in character. It was that "the operator of the bus so negligently operated and managed said bus that the said bicycle so ridden by the said Kathryn Erickson and the said bus operated by the defendant collided, because the driver of said bus was negligent and careless in the operation of said bus." No instruction was given to the jury, purporting to state the charge of negligence stated in the complaint and it has been held that an instruction which directs a verdict must limit the jury to the negligence charged against the defendant in the complaint. Herring v. Chicago and Alton RR Co., 299 Ill. 214; Molloy v. Chicago Rapid Transit Co., 355 Ill. 164; Ratner v. Chicago City Ry Co., 233 Ill. 169; Hackett v. Chicago City Ry. Co., 235 Ill. 116; This instruction should have stated the necessity of proving that charge of general negligence. It does not do so, but told the jury in effect that the driver of the bus was guilty of actionable negligence, unless by the exercise of ordinary care he could and should have avoided the collision. Furthermore, before the jury was warranted in returning a verdict for the plaintiff Kathryn Erickson they must have found from a preponderance of the evidence that the negligence of the operator of the bus was the direct and proximate cause of the accident. This element of liability was omitted. The law, however, was correctly stated in the/^{seventh} given instruction which is as follows: "The court instructs the jury that, if you believe from a preponderance of the evidence that at the time and place of and immediately before the accident, the defendant, by its servant, operated its said bus in a negligent and careless manner and that as a direct result thereof, the said bus collided with the bicycle ridden by the plaintiff, Kathryn Erickson, thereby injuring her, and if you further believe from a preponderance of the evidence that, at the time of and immediately before the accident, the plaintiff, Kathryn Erickson, was

exercising such care and caution as an ordinarily prudent girl of her age, intelligence, capacity and experience would have exercised under the circumstances shown by the evidence, then your verdict should be for the plaintiff, Kathryn Erickson." This instruction is a plain and fair statement of the law on the subject of negligence, actionable and contributory and the giving of it was sufficient and rendered unnecessary the giving of the preceding instruction even if it was unobjectionable.

In ~~the~~ the argument to the jury, counsel for appellees referred to appellant as "a utility operating for profit," spoke of the bus as a "traction" bus and "an instrument of destruction," charged the driver of the bus with "a high degree of responsibility," appealed to the jury "in the name of other little girls throughout the city" and in other respects indulged in words, phrases and sentences wholly uncalled for and highly prejudicial. Objections were made and sustained by the court to several of the improper statements but counsel did not cease the prejudicial trend of his argument. In sustaining one objection the trial court characterized the argument of appellee's counsel as inflammatory. The serious injuries which Kathryn received were calculated to enlist the sympathy of the jury and a forceful and impassioned argument interspersed with inflammatory and prejudicial statements having no bearing upon the real issues involved and throwing no light upon the question for decision may have resulted in the ends of justice being defeated.

Unless the judgment in favor of Kathryn is affirmed, the judgment in favor of her father, Thorsten Erickson, can not stand as his right to recover depends upon his daughter's right of action.

The judgments of the Circuit Court of Winnebago County will be reversed and the cause remanded.

REVERSED AND REMANDED.

STATE OF ILLINOIS, }
SECOND DISTRICT }ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk. 288 I.A. 628⁴

RALPH H. PESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
JAN 18 1937 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1936

Hanna Bechtel,

Appellee

vs.

Jeff Roche,

Lucy Roche,

Byron L. Colburn, Trustee,

Appellees,

William E. Gibson,

Appellant,

Byron L. Colburn,

Farmers State Bank of Eureka,

Cross-appellants.

Appeal from the Circuit
Court of Woodford County

DOVE, J.

On May 2, 1932 Hanna Bechtel filed her bill to foreclose a trust deed executed to Byron L. Colburn, trustee, by Jeff Roche and Lucy Roche. Byron L. Colburn, individually and as trustee and the said Jeff Roche and Lucy Roche were made parties defendant. This trust deed was given to secure the payment of \$10,000.00 and covered eighty acres of land designated in the record as Tract A. Subsequently the bill was amended and made the Farmers State Bank of Eureka and William E. Gibson defendants. Thereafter the bank and Byron L. Colburn, trustee, filed a cross bill to foreclose a trust deed which was also executed by the said Jeff Roche and Lucy Roche and which was given to secure the payment of \$8100.00 and which conveyed to Byron L. Colburn as trustee said tract A and also another tract consisting of 122 acres which is designated in the record as tract B. William E. Gibson also filed a cross bill to foreclose two trust deeds which he held, one of which covered tract A and the other both tracts. Upon a hearing a decree of foreclosure and sale was rendered in favor of the original complainant and which held that her trust deed was a first lien on tract A and dismissed the cross bills of the bank and of Gibson. From that decree Colburn, individually

and as trustee, and the bank prosecuted an appeal to this court which reversed the decree of the Circuit Court and remanded the case to that court with directions to enter a decree in conformity with the opinion of this court. Bechtel v. Locke, 280 Ill. App. 631.

After the mandate of this court was filed in the Circuit Court, the cause was redocketed and a decree rendered from which William E. Gibson prosecutes this appeal and Byron L. Colburn individually and the Farmers State Bank of Eureka have prosecuted a cross appeal.

The decree from which this appeal and cross appeal are prosecuted found the amount due Hanna Bechtel to be \$15,987.31, the amount due the bank to be \$4,913.34 and the amount due William E. Gibson upon his second lien on tract B to be \$15,204.71 and upon his third liens on tracts A and B to be \$29,533.27. The decree then found that the bank had a first and prior lien on both tracts A and B for the payment of the amount found to be due it, that Hanna Bechtel had a second lien on tract A for the payment of the amount found due her, that Gibson had a second lien on tract B for the payment of said amount of \$15,204.71 and a third lien on tracts A and B for the payment of said amount of \$29,533.27 so found due him. The decree then ordered Jeff Locke and Lucy Locke to pay the respective amounts so found due the bank, Hanna Bechtel and Gibson and that in default thereof that the premises be sold separately. The decree also found that the mortgage upon certain real estate located in Paulding County, Ohio, referred to in our former opinion and there found to have been held by the bank to secure the payment of the amount found due it from Jeff and Lucy Locke, was a first lien upon the land therein described and ordered that in the event the amount so found due the bank was satisfied in full out of the proceeds of the sale of tracts A and B, and if the lien of Hanna Bechtel on tract A was not satisfied in full from the proceeds of the sale, that then the mortgage on the Ohio land should be by the bank assigned to her or to someone named by her or by the court for her use.

A reference to our former opinion discloses that Hanna Bechtel procured the trust deed executed by Jeff Rocke and Lucy Rocke and the notes for which it was given to secure in exchange for notes which she held referred to in the record as the Banta notes. In our former opinion we reviewed the evidence as to what occurred when the exchange was made, held that while Colburn effected the exchange, the Rocke notes and trust deed in fact belonged to Gibson, that Hanna Bechtel was so advised, that the bank in no way profited by the exchange, had nothing to do with it and if its cashier made the statement attributed to him by Hanna Bechtel to the effect that the Rocke mortgage which she was accepting was a first lien, he made it about a mortgage not then in the possession of or owned by the bank and the bank therefore was not estopped in this proceeding from asserting its prior lien on tract A. In the decree which we are now reviewing in this recital: "That from the weight of the evidence in this case it appears that Byron L. Colburn represented and stated to Hanna Bechtel that the Rocke mortgage which she was accepting in exchange for the Banta notes and mortgage, was a first lien on tract A but that said representation so made by the said Byron L. Colburn, while, in fact, a misrepresentation upon his part, was not binding upon the Farmers State Bank." The concluding portion of the decree is in the usual form foreclosing the defendants and all persons claiming by, through or under them from all equity of redemption and claim of title to the mortgaged premises unless the same are redeemed and directs the Special Master to execute the decree and report his proceedings to the court. The final paragraph of the decree states that the cause then came on to be heard upon the motion of the bank to refer the cause to the Master for the sole and only purpose of taking testimony as to reasonable value of the services rendered by attorneys for the bank since the former decree in connection with the appeal to this court which motion the decree stated, the court denied.

Counsel for appellant, William E. Gibson insists that the decree

is erroneous because it orders the bank to assign its mortgage on the Ohio land to Hanna Bechtel or to someone named by her or by the court for her use in the event the bank's lien is satisfied in full out of the proceeds of the sale of tracts A and B and Hanna Bechtel's lien is not so satisfied, whereas the assignment should be for his benefit as well as for the benefit of Hanna Bechtel.

Counsel for Byron L. Colburn, cross appellant, insists that the recital in the decree above set forth to the effect that he misrepresented ~~ix ix~~ to Hanna Bechtel that the Rocks mortgage was a first lien on tract A has no place in this decree and should be eliminated therefrom and on behalf of the Farmers State Bank, cross-appellant, it is insisted that it was error to deny its motion to re-refer the cause to the Master for the purpose of taking evidence as to the reasonable value of its attorneys fees for services rendered upon the appeal and which were not included in the former decree.

The concluding portion of our former opinion is as follows: "If, therefore, the bank is not estopped from asserting its prior lien on tract A, what decree should be entered that is equitable to all the parties? As security for the principal sum of \$5900.00, the bank holds a first mortgage on forty-seven acres of land in Paulding County, Ohio, and if the release as to tract B had not been executed, it would also have had a first lien on tracts A and B. Appellee only had a lien on tract A. It is only fair and just that the release of the bank's lien on tract B be cancelled. No consideration passed therefor and no one is objecting to a decree so providing. The bank is clearly entitled to have its lien foreclosed on both tracts A and B. Appellee is also entitled to have her lien on tract A foreclosed. The decree should provide that each tract be sold separately and out of the proceeds derived from the sale of tract B, there should be paid the bank, to apply on the amount due it, a sum in the proportion which the amount it sells for bears to the amount derived from the sale of both tracts. In other words, if tract B sells for \$18,000.00, the amount the Master found it was worth in March, 1931, and tract A sells for

\$18,000.00, the amount the Master found it was worth in March, 1931, then tract B should contribute 9/17s of the amount of the indebtedness so found due the bank. The balance of the proceeds derived from the sale of tract A should be paid Gibson, who now has the legal title thereto. Gibson is entitled to have his \$20,000.00 trust deed foreclosed in this proceeding as to tract A, it being a lien thereon subject to the liens of the bank and appellee. The decree should also provide that in the event the bank's lien is satisfied in full out of the proceeds of the sale and appellee's lien is not satisfied in full, that then the bank shall deliver to appellee the trust deed or mortgage on the Paulding County, Ohio, land, together with proper assignment thereof. This, we understand, the bank offers to do. The decree of the Circuit Court of Woodford county is reversed and this cause is remanded with directions to that court to enter a decree in conformity with this opinion."

The law is well settled that when a decree is reversed by an Appellate Court and the cause remanded to the lower court with directions to enter a decree in conformity with the opinion of the Appellate Court that the trial court can not err if it follows the directions contained in the opinion and mandate of the Appellate Court and enters the decree which the Appellate Court says should have been entered in the first instance and upon an appeal from such a decree, the only question presented is whether the decree entered is in accordance with the mandate and directions of the court of review. *Belding v. Belding* 281 Ill. App. 351.

The paragraph of our former opinion above set forth specifically directed the lower court how to proceed and what its decree should contain. The decree entered follows the mandate and the former opinion of this court and conforms in all essential respects to the directions therein contained. The record in the first instance came to this court upon an appeal by Byron L. Colburn, individually and as trustee, and the Farmers State Bank. Jeff and Lucy Rocke defaulted in the lower court and in this court. Gibson prosecuted no appeal

and filed no brief in this Court. Hanna Bechtel was the only appellee who appeared or filed a brief in this court and no one other than she is referred to throughout the opinion as appellee. It is clear, therefore, that in the sentence: "The decree should also provide that in the event the bank's lien is satisfied in full out of the proceeds of the sale and appellee's lien is not satisfied in full, that then the bank shall deliver to appellee the trust deed or mortgage on the Paulding County, Ohio, land, together with proper assignment thereof," where we used the word "appellee" we meant Hanna Bechtel and the Chancellor correctly construed our language and so decreed. Furthermore, in our former opinion we found that in making the exchange of the Santa securities for the Roche notes and trust deed, Colburn, acting on behalf of Gibson, deceived Hanna Bechtel in representing to her that the Roche trust deed was a first lien on tract A, Gibson therefore is not entitled inequity to have the assets which the bank held to secure its lien marshalled in his favor to the detriment of Hanna Bechtel.

In the course of our former opinion we also said: "The weight of the evidence is that Colburn stated to appellee that the Roche mortgage which she was accepting in exchange for the Santa notes and mortgage was a first lien on tract A." The decree appealed from seeks to preserve this finding. It recites: "That from the weight of the evidence in this case it appears that Byron L. Colburn represented and stated to Hanna Bechtel that the Roche mortgage, which she was accepting in exchange for the Santa notes and mortgage was a first lien on tract A, but that said representation so made by said Byron L. Colburn, while, in fact, a misrepresentation upon his part, was not binding upon the Farmers State Bank." This language in our former opinion was used in connection with a consideration of the issue between Hanna Bechtel and the bank upon the question whether she or the bank had a prior lien on tract A. The present decree correctly dismisses the bill for want of equity against Colburn individually and the decree entered by the trial court with this recital eliminated effectively adjudicates the issues raised by the

pleadings in this cause.

The record discloses that \$349.22 was included in the amount found due the bank for its attorney fees in the decree which we are reviewing. Counsel for the bank state that upon this cause being redocketed in the lower court, a motion was made to re-refer the cause to the Master for the purpose of taking evidence as to the reasonable value of its attorney fees for services rendered in this court upon the former appeal. If a written motion of this character was made, it nowhere appears in the record. The only reference made to such a motion is in the final paragraph of the decree. The language there used indicates that it was after the final decree had been pronounced by the court that the motion of the bank to re-refer the cause to the Master came on to be heard and such motion must have been an oral one. Furthermore, there is nothing in this record which discloses the provisions of the bank's trust deed with reference to the assessment and allowance of fees to its attorneys and in view of the mandate of this court reversing the former decree and remanding the cause with specific directions, we are not inclined to reverse this decree in order that the bank may be given an opportunity to offer further evidence on the question of attorney fees.

The decree appealed from will be modified by striking therefrom the following recital, viz: "That from the weight of the evidence in this case it appears Byron L. Colburn represented and stated to Hanna Becatel (appellee) that the Locke mortgage, which she was accepting in exchange for the Banta notes and mortgage, was a first lien on tract 'A' but that said representation so made by the said Byron L. Colburn, while, in fact, a misrepresentation upon his part, was not binding upon the Farmers State Bank," and as so modified the decree will be affirmed. Appellant and the cross-appellant bank will pay the costs in this court.

DECREE MODIFIED AND AS MODIFIED AFFIRMED.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

9129

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in
the year of our Lord one thousand nine hundred and thirty-six,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. PESPER, Sheriff. 288 I.A. 629'

BE IT REMEMBERED, that afterwards, to-wit: On

197 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1936

Dr. F. J. Otis,

Appellant

vs.

Mrs. Roberta Briar and
T. S. Craig,

Appellees.

Appeal from the Circuit Court
of Rock Island County.

DOVE, J.

This action was instituted by F. J. Otis against Roberta Briar before a Justice of the Peace, resulting in a judgment on January 14, 1935 against the defendant for \$110.00 and costs of suit. On January 13, 1935 the defendant Roberta Blair as principal and T.S. Craig, as surety, executed an appeal bond in the penal sum of \$250.00, which was duly filed and approved by the Justice of the Peace and this bond and a transcript of proceedings in the Justice Court was filed in the office of the Clerk of the Circuit Court of Rock Island County on January 23, 1935. On February 1, 1935 the appearance of the plaintiff and a waiver of a jury trial was filed in the Circuit Court by plaintiff's attorney, and thereafter the cause was duly set down for trial as provided by the rules of the Circuit Court of Rock Island county and on February 6, 1935 the cause was called for trial. The defendant did not appear and was defaulted and judgment was rendered in favor of the plaintiff and against the defendant for \$250.00 and a scire facias ordered to issue against the surety on the appeal bond. On the next day a scire facias was issued and on February 9, 1935 was duly served on said surety.

On February 11, 1935 the defendant filed her motion to set aside the default judgment and scire facias and declare the same null and

void, alleging the withdrawal of her attorney without notice to her. After a hearing on February 19, 1935 upon this motion an order entered that "said judgment is opened and execution and scire facias stayed at defendant's costs." Nothing further appears to have been done until May 8, 1936, at which time the plaintiff filed her motion for a rule on the defendant to file a good and sufficient appeal bond. On May 8, 1936 an order was entered reciting that the plaintiff, the defendant and the surety were represented by counsel and that this cause came on to be heard upon plaintiff's motion to have the court require the defendant to file a good and sufficient appeal bond and "the court having heard the argument of counsel and being now fully advised in the premises, allows said motion and the original appeal bond is cancelled, and the said defendant is granted ten days in which to file a new and sufficient bond." On June 3, 1936³, the plaintiff filed his motion reciting the various steps that had been taken in the case, particularly the entry of the order of May 8, 1936 and alleged that more than ten days had elapsed since that order was entered and that no appeal bond had been filed and prayed that the order of February 19, 1935 be vacated, that the original judgment of February 8, 1935 rendered by the Circuit Court for \$250.00 stand in full force and effect and that the order of May 8, 1936 in so far as it purports to cancel the appeal bond be vacated and the surety be required to plead to the writ of scire facias. On June 8, 1936 an order was entered reciting that the several parties were represented by counsel and that this motion came on for hearing and was denied. The same order dismissed the appeal and awarded a procedendo. On July 22, 1936 a notice of appeal by the plaintiff was filed and the record is before this court for review.

No appearance and no briefs have been filed by Roberta Briar. T. S. Craig, the surety on the appeal bond and defendant in the writ of scire facias, has filed a brief in this court in which he contends that the order of May 8, 1936 was not objected to by the plaintiff in the trial court at the time it was entered, that it was in fact entered

pursuant to appellant's motion and is therefore not subject to be reviewed by this court. This is clearly a misapprehension on the part of counsel. What the record discloses is that on May 6, 1936 appellant entered, in the trial court, a motion for a rule on the defendant, Roberta Briar, to file a good and sufficient appeal bond. This motion was allowed on May 8, 1936 and the defendant was granted ten days from that date to file a good and sufficient bond. It is true the order says that the original appeal bond was cancelled but there was nothing in appellant's motion which asked for that portion of the order and no reason appears in the record why it was included in the order. To hold that if a plaintiff files a motion in an appellate court, after the defendant removes a case to such appellate court from a justice court by filing a bond as provided by statute, for a rule on such defendant to give a good and sufficient appeal bond, and the appellate court grants such motion and enters such a rule, that then the appellate court may also in the same order cancel the original bond without any request or motion therefor and by so doing deprive such plaintiff of the benefits, whatever they may amount to, which enure to him as obligee in such bond has no support in reason or authority.

Counsel for appellee insists that if appellant's motion of May 6, 1936 did not expressly request a cancellation of the original appeal bond, it did so by implication and argue that by this motion to require the defendant to file a good and sufficient appeal bond, appellant in effect elected to reject the defendant in scire facias as surety on that bond. Counsel also argue that when the ten days elapsed as provided in the order of May 8, 1936, and no new bond was filed in compliance therewith, that then the Circuit Court was without jurisdiction to make any further orders and had it allowed appellant's motion of June 3, 1936 and vacated the portion of the order of May 8, 1936 which cancelled the appeal bond, that such an order would have been a nullity and concludes their argument by stating: "Actually, no hardship will be imposed upon appellant by an affirmance of the lower court's rulings.

He received a judgment in the justice of the peace court. That he was apparently satisfied with the same is evidenced by the fact that he did not appeal therefrom, but rather took immediate steps to levy execution thereon. The final action of the Circuit Court leaves that judgment in full force and effect. Of what, then, has the appellant to complain?"

We fail to find any merit in appellee's contentions or argument. Appellant never expressly requested the court to enter an order cancelling the appeal bond, nor did he do anything which can be construed as impliedly requesting any such action, nor has any authority been cited which holds that when no new bond was filed within ten days after May 8, 1936, that the court, which entered the order, was without jurisdiction to make any further orders in this cause. In the instant case, by reason of the appeal bond which was filed and approved by the justice of the peace on January 18, 1935, appellant here was precluded from proceeding to collect the judgment which he had obtained before the justice of the peace on January 14, 1935. The obligation of appellee upon the appeal bond which he executed is a valid and effectual obligation in favor of appellant and executed for his benefit and no reason appears why appellant should be deprived of the benefit of its provisions.

The judgment of the Circuit Court of Rock Island County is reversed and this cause is remanded to that court with directions to set aside and vacate the order of June 8, 1936 which dismissed the appeal and awarded a writ of procedendo and to set aside and vacate that part of the order of May 8, 1936 which purported to cancel the appeal bond and to enter an order ruling the defendant Roberta Briar to file a good and sufficient appeal bond within ten days from the entry of the order, said order to provide that if such good and sufficient appeal bond is not filed within said ten days, that then the order of February 19, 1935 which opened up the judgment of February 6, 1935 is vacated and the judgment of February 6, 1935 for \$250.00 is ordered to stand. Said order to further rule appellee T. S. Craig to

to plead to the writ of scire facias within twenty days, in the event no good and sufficient appeal bond is filed within said ten day period. This cause then to proceed as the law directs.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

9155

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AT A TERM OF THE AFFILIATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in
the year of our Lord one thousand nine hundred and thirty-six,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. RESPER, Sheriff.

288 I.A. 629²

BE IT REMEMBERED, that afterwards, to-wit: On
JAN 18 1937 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1936.

Arthur T. Saltzgiver, Executor
of the Last Will and Testament
of Frank Saltzgiver, deceased,

Appellant,

vs.

Appeal from the County Court
of Kankakee County

William McGrath, Frances McGrath,
William Allers, Jr., and Maude
Allers,

Appellees.

DOVE, J.

This is a suit instituted by the executor of the last will of Frank Saltzgiver to recover \$280.00 and interest, evidenced by a promissory note executed by the defendants and dated July 6, 1923, due February 1, 1925, payable to the order of S. D. and Frank Saltzgiver, with six per cent interest from date. The complaint was filed on March 12, 1935 and alleged that the payee, S. D. Saltzgiver, died testate on August 29, 1926, leaving his property to the other payee, that on January 7, 1935 Frank Saltzgiver died testate and that his will has been admitted to probate and the plaintiff herein has duly qualified and is acting as executor thereof. The defendants answered, admitting the execution of the note set forth in the complaint, the death of the payees and the appointment of the plaintiff as executor of the last will of Frank Saltzgiver. By their answer they aver that after the note was executed but prior to February 1, 1925 the defendant William McGrath paid to the payees and they accepted from him the sum of \$280.00, together with all accrued interest thereon, in full satisfaction and discharge of said note. Their answer further averred that at the time the note was paid the payees assured William McGrath that

they would return the note to him but charges that they failed and neglected to do so. A jury was waived and the cause submitted to the court for determination, who found the issues for the defendants and rendered judgment in bar of the action and for costs. From this judgment the plaintiff has prosecuted this appeal.

Upon the trial the plaintiff produced the note which was admitted in evidence without objection and rested. On behalf of the defendants, it was stipulated that on July 6, 1923, S.D. Saltzgiver and Frank Saltzgiver, the payees of said note, entered into a written lease with appellees. In the body of the lease, William and Frances McGrath are designated as party of the second part, but the lease was executed by them and also by William Allers and Maude Allers. By the provisions of the lease, S. D. and Frank Saltzgiver leased eighty acres of land in Kankakee County to second party from March 1, 1924 to the last day of February, 1929 for which second party agreed to pay as rent \$560.00 each year, one-half thereof on September 1st and the remaining one-half on February 1st of each year. The lease recites that two notes are given, each in equal amounts, drawing no interest if paid when due, each note to bear six per cent interest and that William Allers and Maude, his wife, agree to sign with second party as surety both the lease and the notes. It also appears from the record that the defendant William McGrath testified and his testimony was received by the court subject to the objection of counsel for appellee. He testified that he paid the note on February 7, 1925 by delivering to S. D. Saltzgiver a check for grain which he had received from a local grain dealer; that he did not receive the note but Saltzgiver promised to send it to him; that Saltzgiver did give him a receipt but he had lost the receipt and the note had never been returned to him; that the records of the grain company had been destroyed and he was unable to substantiate his statement that he received a check for \$280.00 from the grain company. It also appears from the evidence

that on February 7, 1925 the account of S. D. Saltzgiver in the First Trust and Savings Bank of Kankakee, where he did his banking business was credited with \$140.00, the deposit ticket showing that on February 7, 1925 he had an outside check, that is a check drawn on a bank other than the First Trust and Savings Bank, for \$280.00, that one-half of that amount deposited to his credit in the Trust and Savings Bank and \$140.00 was not deposited to the account of S. D. Saltzgiver, but that Frank Saltzgiver had a separate bank account.

Albin Anderson testified on behalf of the appellees that he knew S. D. and Frank Saltzgiver, that they owned eighty acres of farm land and he was their tenant and that while he was thereon his landlords would not extend the payment of the rent from one year to another; that after he left the farm, appellee, William McGrath, moved on it and remained there five years. He and Guy Strawson both testified that between 1924 and 1929, William McGrath, while he lived on the Saltzgiver farm, raised average crops, and owned cattle and farm implements and stock, and if there was any mortgage upon his stock, these witnesses didn't know of it. That after McGrath left the farm he moved to another farm of one hundred and twenty acres and farmed it, had livestock and farm implements sufficient to farm and produced crops during the years he farmed.

William McGrath and William Allers, two of the defendants, testified that no demand was ever made upon them to pay the note sued on after the death of S. D. Saltzgiver, which occurred on August 29, 1926, until after the death of Frank Saltzgiver, which occurred on January 7, 1935. That the only demand to pay was made by the attorney representing the estate of Frank Saltzgiver.

The foregoing is a fair resume of all the evidence found in this record. Appellant insists that William McGrath was an incompetent witness and without his testimony there is no evidence in the record to sustain the judgment of the trial court. Counsel for appellees concedes that section two of the Evidence Act bars the

testimony of William McGrath as to facts and circumstances pertaining to the execution of the note and to any other part of that transaction but does not prevent him from testifying that he received a receipt from the deceased and that he lost it and then stating the contents of such receipt, nor does it prevent him from testifying that he received a check from the grain company, that the check has been lost and then testifying as to its contents. In support of this contention the case of Lueth v. Goodknecht, 545 Ill. 197 is called to our attention. Section two of the Evidence Act provides in part that no party to any civil action shall be allowed to testify of his own motion when any adverse party sues as executor of any deceased person. It has been held that the disqualification from testifying is against the party defending adversely to the executor. Bailey v. Robison, 244 Ill. 16, and the reason for the rule is the inability of the executor to oppose the statements or meet the evidence of such adverse party. In the Lueth case, supra, the plaintiff John F. Lueth sued in his individual capacity as surviving partner and was not suing as trustee, conservator, executor, administrator, heir legatee, devisee or guardian and therefore the provisions of Section 2 of the Evidence Act were not involved. What the court held in the Lueth case was that Section 4 of the Evidence Act was applicable, that a partnership estate possesses certain characteristics which distinguish it from the personal estate of a deceased person and afford ample basis for the classification made by the Evidence Act. Under the statute and the authorities William McGrath was not a competent witness to testify that he received a check from the grain company, or to state what he did with it or that it was lost or what the contents of that check were, nor was he a competent witness to testify that he paid the deceased payee the note sued on or detail how he paid him or what the deceased payee said or did when he paid him nor was he a competent witness to prove that he obtained from the payee a receipt for the money which he paid or that he lost the receipt or to the contents of

such lost receipt. To permit him to do so would do violence to the plain provisions of the statute.

Counsel for appellees finally contend that without the evidence of the defendant, William McGrath, there is sufficient testimony in the record to sustain the judgment of the trial court. What this evidence shows is that the First Trustand Savings Bank of Kankakee credited ~~xxxxxx~~ the account of S. D. Saltzgiver on February 7, 1925 with \$140.00, that the deposit ticket shows that an outside check for \$280.00 formed the basis for the deposit, what became of the remaining \$140.00 or from whom this check was received by S. D. Saltzgiver or for what purpose are all left to conjecture. The evidence further shows that on March 5, 1927 the defendant William McGrath borrowed \$57.00 from this bank, executed a note to this bank upon which Frank Saltzgiver was surety, that on the same day the account of Frank Saltzgiver was credited with this \$57.00 and also \$223.00. Counsel assert that this \$280.00 was in payment of the McGrath rent note due February 1, 1927 and argue that the act of Frank Saltzgiver in signing a \$57.00 surety note for McGrath on March 5, 1927 is not consistent with the contention of appellant that McGrath had not paid the \$280.00 due more than two years previous. Counsel for appellees further argue that it is unreasonable to believe that the payees of the note sued on would have retained Mr. McGrath as a tenant for four years after the note became due if he were delinquent in paying the note sued on, that as the note or any part thereof was not inventoried as an asset of the estate of S. D. Saltzgiver, and no demand for payment made until after the death of both the payees, and that suit thereon was not instituted until March 12, 1935, which was just twenty-three days before the Statute of Limitations would have been available to the defendants as a plea in bar to the prosecution of this suit, that the only fair conclusion that can be drawn is that the note sued on was paid.

The defense of payment is an affirmative defense, which it

was incumbent upon appellees to establish by competent evidence, and the competent evidence without considerable more proof than is found in this record does not in our opinion establish that the note sued on has been paid. If appellees are compelled to pay an obligation that has been once discharged, it is due to the fact that they failed to procure, when it was paid, the instrument which evidenced their indebtedness or preserve some competent evidence of its payment.

The judgment of the trial court must be reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

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AT A TERM OF THE APPELLATE COURT,

Begin and held at Ottawa, on Tuesday, the sixth day of October, in
the year of our Lord one thousand nine hundred and thirty-six,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. PESPER, Sheriff.

288 I.A. 629³

BE IT REMEMBERED, that afterwards, to-wit: On
JAN 18 1937 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1936.

Harlow H. Belding,

Appellant

Appeal from the Circuit

vs.

Court of DuPage County

Edith L. Belding, Individually and
as Administratrix of the Estate of
Wilbert D. Belding, deceased, et al.,

Appellees.

DOVE, J.

On January 7th, 1936 Harlow H. Belding filed his complaint in the Circuit Court of DuPage County to wind up the affairs of a partnership entered into on January 7, 1918 by and between Wilbert D. Belding, Edgar E. Belding and the plaintiff. Among other things the complaint alleged that the partnership business was conducted under the name and style of E. E. Belding and Sons; that on September 19, 1928 Wilbert D. Belding died and on October 1, 1928 Edith L. Belding was appointed administratrix of his estate: that on November 27, 1933, Edgar E. Belding died testate, and thereafter the plaintiff and Ora L. Finley were appointed executors of his Last Will and Testament. The complaint then alleged that the said Edgar E. Belding, deceased, contributed certain assets at the time of the formation of the partnership and that the partnership thereafter acquired certain real estate; that at the time of the death of the said Wilbert D. Belding, the partnership owned certain personal property as well as said real estate and that there were certain uncompleted contracts which were finished after the death of the said Wilbert D. Belding and that, at the time of the death of the said Wilbert D. Belding, the partnership was indebted in the various amounts as set forth in the complaint. It was then alleged that since the death of Wilbert

D. Belding, the plaintiff has continued to hold and possess the partnership property for partnership purposes in accordance with the Statute and that Edith L. Belding, as administratrix of Wilbert's estate on January 25, 1935 in case No. 18641 in the Circuit Court of DuPage County, procured the entry of a decree by virtue of which she claims that there is due and owing to her from the partnership the sum of \$13,150.68. The complaint concludes by an averment that the plaintiff is the sole surviving partner and that he desires to wind up the partnership affairs in accordance with the Statute and prays that the rights of all of the partnership creditors and partners and their legal representatives be ascertained and declared by the court, that all the liabilities of the partnership may be paid and satisfied out of the proceeds of the sale of partnership assets and that the surplus, if any, may be divided between the plaintiff and the legal representatives of said deceased partners or that in the event the proceeds are not sufficient to pay such liabilities that then the estates of the deceased partners may be required to contribute, in the relative proportions in which they share in the proceeds of the partnership, the additional amount necessary to pay such liabilities. The complaint also prays that Edith L. Belding, as administratrix of the estate of Wilbert D. Belding, be enjoined from selling or attempting to sell any of the property of the partnership or of the plaintiff in order to satisfy the said judgment rendered in the case of Edith L. Belding vs. Harlow H. Belding, et al, being Gen. No. 18,641, until the further order of the court.

The defendant Edith L. Belding, individually and as administratrix, filed an answer in which ~~she~~ set out in detail the proceedings in said case of Edith L. Belding vs. Harlow H. Belding, et al, being cause No. 18,641 as a bar to the maintenance of the action of the plaintiff. In this answer she set forth the original bill of complaint in this cause No. 18,641 and attached to her answer a copy thereof, by which it appears that on August 31, 1931 she filed her bill for an account, settlement and division of the partnership property. This complaint

alleged the formation of the partnership between Wilbert D. Belding, Harlow H. Belding and Edgar E. Belding, on or about January 7, 1918, pursuant to the partnership agreement, a copy of which was attached to said original complaint. This original complaint made Harlow H. Belding and Edgar E. Belding, who were then living, parties defendant as surviving partners of the partnership of E. E. Belding & Sons, alleged the termination of that partnership by the death of Wilbert D. Belding on September 19, 1928 and averred that the partnership articles were modified after they were executed so that the interest of the several partners would be equal. In her answer in the instant case it was averred that the partnership property which she described in her original bill of complaint was the same property referred to and described in plaintiff's complaint and further averred that after her complaint was filed, the surviving partners filed an answer and also an inventory of the partnership assets, which disclosed the same mortgage indebtedness and liabilities referred to in the plaintiff's complaint herein. Her answer in the instant case further averred that after the surviving partners had appeared and filed an answer to her original complaint, she filed a replication to that answer and that the cause was referred to the Master-in-Chancery, who proceeded to take the proofs of the respective parties and made a report thereof to the court. Her answer then alleges that after the death of Wilbert D. Belding, the surviving partners Harlow H. Belding and Edgar E. Belding remained in the possession of the partnership property and continued the partnership business without making any settlement of accounts with her as administratrix and that on March 27, 1931 Edgar E. Belding conveyed allof his right, title and interest in the partnership property to Harlow H. Belding, the plaintiff herein, and that he continued to carry on the partnership business in the partnership name, using the partnership property and effects. Her answer then set forth the provisions of the decree entered in said original cause No. 18641 and averred that the cause was thereafter appealed to the Appellate Court, where the decree of the trial court was reversed in part. (Belding v. Belding, 272 Ill. App. 196). Her

answer then averred that thereafter the judgment of this court and the decree of the Circuit Court were reversed by the Supreme Court. (Belding v. Belding, 358 Ill. 216). That thereafter and on January 25, 1935, in accordance with the views expressed in the opinion of the Supreme Court, a decree was entered in the Circuit Court which found, among other things, that the net value of the partnership assets of E. E. Belding & Sons at the time of the death of Wilbert D. Belding was \$51,525.96, and that the interest of this defendant, as administratrix of ~~the~~ Wilbert D. Belding, deceased, was one-third thereof subject to a deduction which had been paid her and that she was entitled to receive the sum of \$13,158.13, with interest thereon from Harlow H. Belding individually and Harlow H. Belding and Ora L. Finley, Executors of the Estate of Edgar E. Belding, deceased. That thereafter and on August 14, 1935 this court affirmed the decree of the trial court, Belding v. Belding, 281 Ill. App. 351, and subsequently a petition by the plaintiff herein for leave to appeal to the Supreme Court was denied and thereafter the mandate of this court was filed in the trial court and that said decree remains unsatisfied and in full force and effect. By her answer she further alleged that said sum of \$13,158.13, so found to be due her, was the result of the accounting and settlement of the partnership affairs of Wilbert D. Belding, Harlow H. Belding and Edgar E. Belding, doing business as E. E. Belding and Sons, pursuant to the terms of the Uniform Partnership Act, and that the decree of January 25, 1935 is the identical order, judgment and decree mentioned in plaintiff's complaint, and the identical partnership matter, accounting and settlement which plaintiff asks to relitigate and she therefore claims the bar of said decree as res adjudicata.

The record discloses that issue was joined upon the allegations of this answer and a hearing had in open court and upon the hearing there was offered in evidence the original complaint of Edith L. Belding, filed August 31, 1931, the joint and several answer of Edgar E. Belding and Harlow H. Belding thereto, together with the original decree entered January 23, 1933, the mandate of the Supreme Court, the

decree of January 25, 1935 entered by the Circuit Court in pursuance to that mandate, the mandate of this court affirming that decree,² together with the order of the Supreme Court denying the petition for leave to appeal from the judgment of this Court. The trial court sustained defendant's plea ~~of~~ ⁱⁿ res adjudicata and dismissed the complaint for want of equity and it is from this decree that this appeal has been perfected.

Counsel for appellant insists that the former decree does not adjudicate either that the surviving partner may wind up or that he may not wind up the affairs of a partnership and calls our attention to Section 37 of the Uniform Partnership Act, which, counsel contend, gives appellant, Harlow H. Belding, surviving partner, the right to wind up the partnership affairs and provides that he may obtain such winding up by the court.

It is not necessary for us to review at length the history of this litigation. But we respectfully refer counsel to the case of Belding v. Belding, 272 Ill. App. 196, Belding v. Belding, 358 Ill. 216 and Belding v. Belding, 381 Ill. App. 351. An examination of those opinions disclose that the identical partnership affairs, which appellant seeks to settle, were found to be dissolved by the death of Wilbert D. Belding on September 19, 1928, that on October 1, 1928 Edith L. Belding was appointed and qualified as administratrix of the estate of her deceased husband, Wilbert D. Belding, that she is still acting as such administrat~~rix~~ and that the assets of the partnership were left in the possession of the surviving partners Harlow H. Belding and Edgar E. Belding. Under the provisions of the Uniform Partnership Act, the title to the partnership property became vested in the said Harlow H. Belding and Edgar E. Belding and they had a right to windup the partnership affairs. These surviving partners, however, did not proceed to wind up the partnership affairs, but continued the partnership business, using the partnership name and the partnership property without making any settlement with the representative of the estate of their deceased partner. It further appears that on March 27, 1931 Edgar E. Belding conveyed all of his

right, title and interest in and to the partnership property, both real and personal, to appellant the other surviving partner, Harlow H. Belding. Almost three years had elapsed after the death of Wilbert D. Belding before his widow, as representative of his estate, took any legal steps to settle the partnership affairs and it was not until August 31, 1931 that she filed her original bill of complaint, in which she asked for an accounting, settlement and division of the partnership property. The surviving partners, Harlow H. Belding and Edgar E. Belding, were made parties defendant. They answered. The cause proceeded to a decree, and that decree found that appellee here elected to take in her representative capacity as administratrix under Section 42 of the Uniform Partnership Act an amount equal to the value of the interest of Wilbert D. Belding in the partnership of E. E. Belding & Sons, at the time of his death, with interest from the date of his death. That decree also found that the net worth of the partnership at the time of death of Wilbert D. Belding was \$53,144.45, and the surviving partners were ordered to pay to the plaintiff as administratrix \$12,728.29 with interest. This is the first decree that this court reviewed and our opinion is reported in Belding v. Belding, 272 Ill. App. 196. Thereafter the judgment of this Court was reversed by the Supreme Court and the cause was remanded to the trial court with directions to enter a decree in accordance with the views expressed by the Supreme Court. Belding v. Belding, 358 Ill. 216. In compliance with the directions of the Supreme Court, the Circuit Court entered, on January 25, 1935, a decree which was reviewed by this court, Belding v. Belding, 281 Ill. App. 351, and the decree of the trial court was affirmed. Subsequently leave to appeal to the Supreme Court, was denied by the court, and the mandate of this court was thereupon filed in the Circuit Court, and the evidence discloses that that decree has never been satisfied or complied with.

Upon its review of the original case, the Supreme Court held that Edith L. Belding, appellee herein, had a right to elect whether she

would take the value of her deceased husband's interest in the partnership property at the time of his death, with interest thereon or in lieu of interest take the profits attributable to the use of his interest in the property arising thereafter and found that she elected to receive the value of Wilbert's interest at the time of his death with interest thereon and determined the value thereof and the decree of January 25, 1935 found that she was entitled to recover a money judgment for the amount due her and ordered Marlow H. Belding individually and Marlow H. Belding and Ora L. Finley, as executors of the last Will and Testament of Edgar E. Belding, deceased, to pay the amount so found due her, as the personal representative of her deceased husband. The right, therefore, of Edith L. Belding to recover the foregoing amount has been determined and it is a well settled principle of law that not only the questions that were actually decided upon the trial of a cause but all questions and matters which might have been raised, determined and litigated must be considered as passed upon and are to be treated as res adjudicata in any subsequent litigation. *Godschalok v. Weber*, 247 Ill. 269. In the instant case the evidence discloses that there is a complete identity of parties and their privies and subject matter with the parties and the subject matter of the original suit and in our opinion appellee's evidence presented a complete defense and the trial court correctly sustained the plea and rendered the decree appealed from.

Appellee insists that the institution of this suit and the prosecution of this appeal are for delay only and insist that damages should be allowed as provided by the Statute (Ill. State Bar Stats. 1935, Chap. 33, Par. 23). In *Drainage Commissioners v. Mansfield*, 348 Ill. page 50, the Supreme Court held that this provision can only be invoked where the appeal is not prosecuted in good faith. In the instant case, while we are of the opinion that there is no merit in appellant's contention, we do not believe the statutory provision applicable.

Appellee, prior to filing her briefs in this cause, filed her motion to dismiss the appeal because of the claimed insufficiency of the Notice of appeal, the praecipe for the record and the abstracts and briefs filed by appellant. This motion was taken with the case. The notice of appeal is not in strict conformity with rule thirty-three of the Supreme Court and it was necessary for this court to go to the record and examine there the complete answer of appellee filed herein and the several pleadings and decrees which were offered in evidence upon this hearing, but we have deemed it advisable to pass upon the merits of the controversy and bring this litigation to an end. The motion of appellee to dismiss the appeal will be denied and as we are of the opinion that the only decree that could have been rendered was the decree appealed from, that decree will be affirmed.

DECREE AFFIRMED.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

9102

35

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in
the year of our Lord one thousand nine hundred and thirty-six,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk. 286 I.A. 629⁴

RALPH H. DESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 10 1937 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A.D. 1936

Louis Smith,
Plaintiff-Appellee
vs.

Appeal from Circuit Court,
Peoria County.

Illinois Power and Light
Corporation, a corporation,
Defendant-Appellant.

Wolfe, J.

This case comes to us upon an appeal from a judgment entered by the Circuit Court of Peoria County, on a verdict of the jury in favor of the Plaintiff, Louis Smith, against the Illinois Power and Light Corporation, the defendant, in the amount of \$15,000.00.

The complaint filed by the plaintiff, consisted of three counts identically the same, as to the first six paragraphs. After stating the time, the place and the nature of the business, in which the defendant was engaged, he charges that the defendant was operating a certain street car on Adams Street, in the City of Peoria, Illinois; that the agent or servant of said company, had brought the car to a stop at the intersection of Adams Street and Western Avenue, for the purpose of discharging and receiving passengers, and the same was a regular stopping place for said cars; that the plaintiff, at all times, was in the exercise of due care and caution for his own safety. The petition then continues with paragraphs 6 and 7, which are as follows: 6. "That said plaintiff at the time and place aforesaid was attempting to board said street car in order to become a passenger thereon for hire while it was so stopped, and that it then and there became the duty of said defendant, by and through its agent or servant then in charge, to cause said street car to remain at said stopping place for a sufficient length of time to give the plaintiff a reasonable opportunity safely to board said street

car for the purpose of becoming a passenger thereon.

7. That the defendant, wholly disregarding its duty in that behalf negligently and carelessly closed the door designated for the purpose of receiving and discharging passengers on said street car and caused said street car to start and move forward while the plaintiff was in the act of boarding said street car and before plaintiff had a reasonable opportunity to board said street car, and by reason thereof plaintiff's overcoat became caught and entangled in the door or step, or either or both of them, and by reason thereof plaintiff was dragged by said street car and thrown to, upon and against the pavement on said Adams Street at the said intersection, and dragged, thrown and otherwise propelled under and beneath the wheels of said street car and the wheel or wheels of said street car ran over the right leg of plaintiff, so crushing, injuring and mutilating said leg, that amputation thereof, immediately below the right knee, became necessary, and said leg was so amputated."

Paragraph 7, of the second and third counts of the petition are a little different in language, but in substance are the same as paragraph 7, of the first count. The petition concludes with the description of the injuries and prays damages in the sum of \$50,000.00.

The case was tried before a jury, who found the issues in favor of the plaintiff and assessed his damages at \$15,000.00. The usual motion for a new trial was entered, specifying numerous reasons to sustain the Company's contention that the verdict was against the manifest weight of the evidence. Also that there were numerous errors of law. The motion for a new trial was overruled, and judgment entered on the verdict in favor of the plaintiff for \$15,000.00

The appellant seriously insists that the verdict in this case, is manifestly against the weight of the evidence, and that the judgment of the trial court should be reversed on this account. We will not pass upon this assignment of error, as the judgment will have to be reversed for other reasons. We express no opinion as to the weight of the evidence.

At the request of the plaintiff, the Court gave to the jury plaintiff's Instruction No. 1, which is: "You are instructed that if you believe from a preponderance of the evidence that the plaintiff was injured by or in consequence of the negligence of the defendant as charged in the complaint and that such negligence was the direct and proximate cause of the plaintiff's injuries, if any, and that the plaintiff was in the exercise of ordinary care before and at the time he was injured then you should find the defendant guilty." The appellant criticizes this instruction and maintains it was reversible error for the court to read it to the jury.

It will be observed that this instruction directs a verdict. The law is well settled that an instruction which directs a verdict for either party, or amounts to such a direction, in case the jury finds certain facts, must necessarily contain all the facts, which will authorize the verdict as directed. *Belkis vs. Derring Coal Company* 146 Illinois Appellate 124. *Montgomery Coal Company v. Gattlinger* 213, Illinois 327.

The instruction directs a verdict in favor of the plaintiff, if he has proven by a preponderance of the evidence, that he was injured by the negligence of the defendant, as charged in the complaint. This instruction, or no other instruction, given by the Court, informs the jury of the negligent acts charged in the complaint. The giving of such instructions was criticized by the Appellate Court of the First District in the case of *Boyd vs. Kimmel* 161, Illinois Appellate 206, but by that court, it was held not to be reversible error.

The instruction is also faulty in that it states: "That the plaintiff was in exercise of ordinary care before and at the time of the injury etc." It omits an important element that should have been included; namely, that he should be in the exercise of ordinary care for his own safety. The omission of these words probably would not be sufficient to reverse the judgment. There is a much more serious objection to this instruction. The petition charges that the plaintiff, just before, and at the time of the accident in

question, was attempting to board the street car, as a passenger of the defendant company. This was a material allegation in the plaintiff's bill of complaint, and the burden was upon him to prove this allegation. The instruction wholly omits this important part of the plaintiff's case and tells the jury that all that is necessary for them to believe, that the plaintiff had proven that the defendant was guilty of negligence, as charged in the complaint, and that the plaintiff was in the exercise of ordinary care at the time of the accident. It is our conclusion that the giving of this instruction, under the circumstances in this case, is reversible error.

The appellee intimates, in his argument, that the defects in this instruction was cured by plaintiff's given instruction 9 and 14. We have examined all of the instructions given on behalf of the defendant and in none of them does it set forth the acts of negligence charged in the plaintiff's petition, but even if they did, under the ruling of Gage vs. City of Vienna, 196 Appellate 585, it would not cure the defects in the given instruction. The Court, in that case, use this language: "Where an instruction undertakes to state the facts necessary to be proven to entitle the plaintiff to recover, it must contain all of the material facts, and where an instruction directs a verdict the failure to include all such facts is fatal and cannot be cured by other instructions in the case. It has always been held that: Where a Court directs a particular verdict if the jury should find certain facts, the instruction must embrace all the facts and conditions essential to such a verdict." Iron and Metal Company vs. Metal 196, Illinois 531. Swiercz vs. Illinois Steele Company 231, Illinois 456. Cromer vs. Border's Coal Company 246, Illinois 451.

The record contains a part of the argument to the jury, made by the attorney for the plaintiff, to which the attorney entered objections for the defendant and the Court sustained the objections. We think the Court very properly sustained the objection to this line of argument, as it was wholly improper. What effect it had on the jury would only be conjectural. Both ~~our~~ our Supreme and Appellate Courts

have reversed cases where the argument to the jury seemed less objectionable. Such arguments should not be indulged in by the attorneys.

As before stated, we do not pass upon the weight of the evidence, but to say the least, it was a very close case, therefore, the instructions must be accurate, and the arguments of counsel confined to the facts in the record.

The Court erred in giving plaintiff's instruction No. 1. The argument of the plaintiff's counsel was objectionable and for these errors, the judgment of the Circuit Court of Peoria County is hereby reversed and the cause remanded.

Judgment reversed and the cause remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in
the year of our Lord one thousand nine hundred and thirty-six,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

288 I.A. 6301

BE IT REMEMBERED, that afterwards, to-wit: On
JAN 10 1937 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A.D. 1936

PURE MILK ASSOCIATION, a
corporation,

Appellee

Appeal from Circuit Court,
Kane County.

vs.

JOSEPH WAGNER, SR., et al.,

Appellants.

Wolfe, J.

The Pure Milk Association, a corporation, procured an injunction in the Circuit Court of Kane County, restraining the appellants and others from selling and delivering their milk, produced on their respective farms, to any one except as authorized by a written agreement, heretofore entered into between the parties. An appeal was prayed to the Supreme Court, but not perfected from this injunction order.

The Pure Milk Association filed a petition, alleging that the appellants had violated the injunction, and asked that the court enter a rule for them to show cause why they should not be punished for violating the injunction order. The court, after hearing evidence, found that the appellants were guilty of violating the injunction order, and that each of them was guilty of contempt of court. He sentenced Joseph Wagner, Sr., to pay a fine of \$150.00 and the other appellants \$25.00 each, and that they pay the costs of the prosecution of the proceedings within 30 days. In default of the payment of the fines and costs, the Court further ordered that each of the respondents be committed to the county jail until his fine and costs were paid. From this order, the appellants perfected an appeal to the Supreme Court of this State.

The appellants contended in the Supreme Court that their constitutional rights had been violated, and therefore, the Supreme Court was the proper forum to hear the appeal. The Supreme Court held that there was not a constitutional question involved and transferred the case to this Court. The opinion of the Supreme Court is reported in Pure Milk Association vs. Wagner, 366, Illinois page 316. The facts in the case are clearly set forth in that opinion, therefore, we have not stated them in detail here.

The Court, in its opinion, after the statement of facts, and their conclusion that a constitutional question was not involved in the case, uses this language: "The question as to whether the decree was correct or incorrect did not control the jurisdiction of the court to pronounce a particular decree, regardless of whether the decree was proper or improper. If it was the claim then that the decree was based on an unconstitutional law, that point should have been raised by a proceeding to review the original decree. The defendants were not justified in ignoring the decree, inasmuch as the court had jurisdiction of the parties to the proceeding and the subject matter of the proceeding in which the original decree making the injunction permanent was entered. Franklin Union No. 4 v. People, 220 Ill. 355; Flannery v. People, 225 id. 62."

The Supreme Court passed on practically all of the questions, ^{raised} in the appeal, with the exception of whether the evidence shows, that the defendants were guilty of violating the terms of the injunction. We think that the evidence clearly shows that each and every one of the appellants were guilty of violating the injunction order.

The appellants seriously insist, that the court erred in proceeding to a hearing in the contempt proceeding, without an order requiring the respondents to answer the petition, and entering a rule to show cause, and that the respondents have done nothing or taken any steps, which could be held to be a waiver of such objections. The order of the court entered the 13th day of September 1934, begins as follows:

THE UNIVERSITY OF CHICAGO

DEPARTMENT OF CHEMISTRY

RESEARCH REPORT

NO. 100

1950

BY

ROBERT H. EMMETT

AND

WILLIAM L. MCGILL

CHICAGO, ILL.

1950

RECEIVED

APRIL 10, 1950

LIBRARY

"This cause coming on to be heard this day upon the petitions for contempt, heretofore filed herein and the rules to show cause, heretofore entered pursuant thereto, and the motion to dismiss, etc." The order then continues with a definite date of September 24, at 10:00 o'clock for a hearing on the merits of the case.

The order finding the appellants guilty of contempt of court entered by the court on September the 4th, A.D. 1935, the first paragraph is as follows: "This cause coming on to be heard upon the rules or orders to show cause hereinbefore entered upon motion of Pure Milk Association, a corporation, the petitioner, by its attorneys against Joseph Wagner, Sr., Joseph Wagner, Jr., Frank Wagner, William C. Allen, Orval Evans, Alek Davis and Harry Getzleman, the respondents herein, and upon the return of said rules or orders together with the petitions of said Pure Milk Association and upon the appearance in court of each and all of the said respondents in person and by their attorneys, and upon the affidavits and answers, both oral and written, of the several defendants in reply to the said petitions and orders to show cause, and upon the evidence presented in open court; and." Paragraph 2, of said order begins as follows: "WHEREAS, an order was hereinbefore entered requiring the defendants, Joseph Wagner, Sr., Joseph Wagner, Jr., Frank Wagner, William C. Allen, Orval Evans, Alek Davis and Harry Getzleman, to show cause, if any they have, why they should not be adjudged guilty of contempt of this court for failure to abide by and conform to the provisions of a certain decree for permanent injunction, etc."

From the recitals in the record in this case, this Court will assume that the trial court did enter a rule to answer the petition, and to show cause why the appellants should not be adjudged guilty of contempt of Court.

It is our conclusion that the court properly found, that each and every one of the appellants are guilty of contempt of court. The judgment of the Circuit Court of Kane County, is hereby affirmed.

Judgment affirmed.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the Republic of China regarding the results of its investigation into the alleged human rights violations in the Xinjiang region.

STATE OF ILLINOIS, }
SECOND DISTRICT }ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

3118

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in
the year of our Lord one thousand nine hundred and thirty-six,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. JESPER, Sheriff.

288 I.A. 630²

BE IT REMEMBERED, that afterwards, to-wit: On
JAN 18 1937 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1936.

Lena Miller,

Complainant and Appellee,

vs.

Louis Rich,

Defendant and Appellant,

Appeal from the Circuit

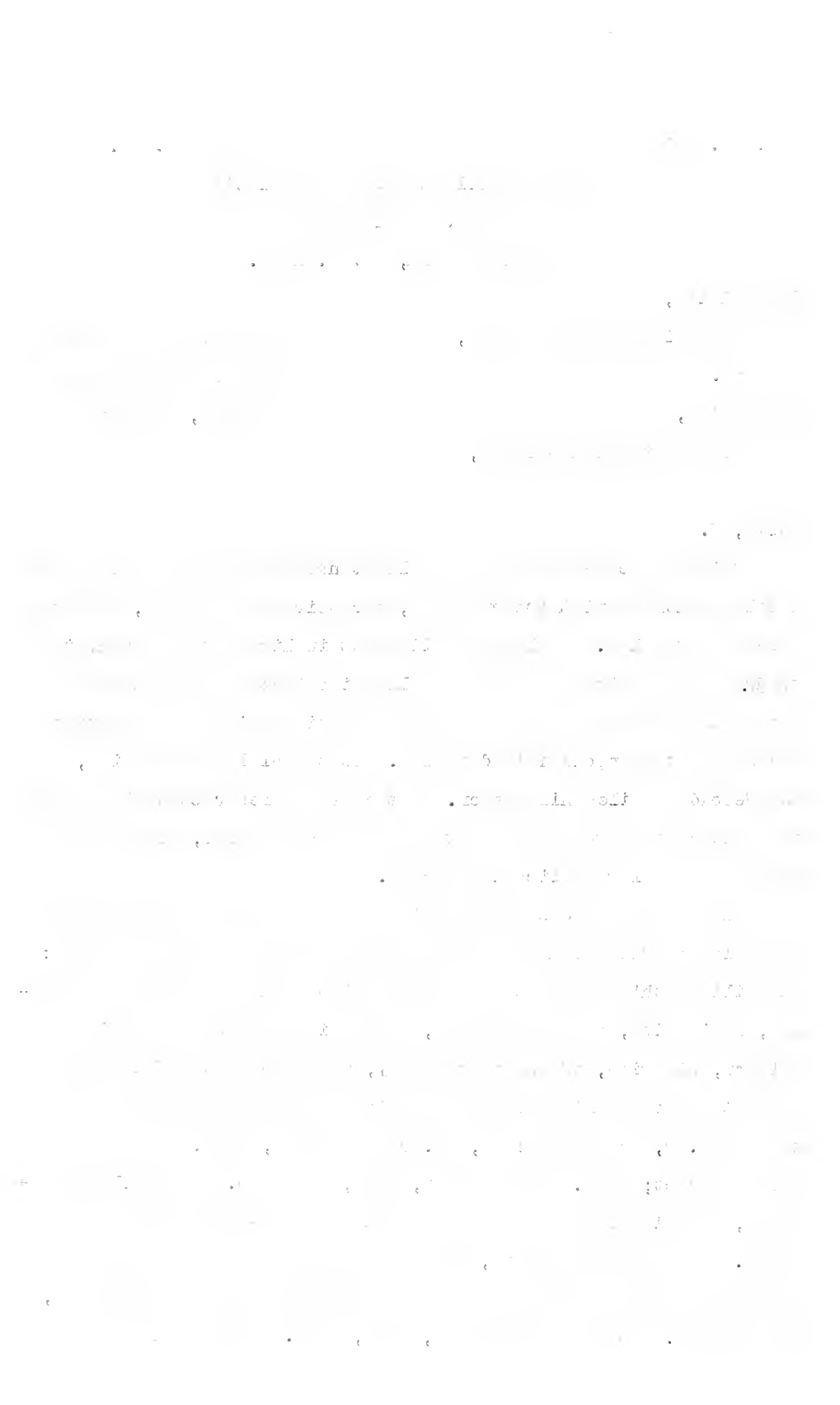
Court of Rock Island

County, Illinois

Wolfe, J.

This is a case where the appellant had heretofore entered into a sales contract with the appellee, her heirs and assigns, for the purchase of a lot. He became delinquent in his payments under the terms of the contract and the appellee instituted a foreclosure proceeding to terminate the contract and his equity of redemption because of the appellant's defaults. To the bill of complaint, the defendant filed his answer. The case was referred to the Master in Chancery to take proof and to report his findings, both of the facts and the law applicable thereto.

The abstract shows the report of the Master in Chancery to be as follows: "And from the competent evidence so submitted I find: The bill in this case sets up a contract of sale between the defendant, Louis Rich, of the one part, and David Halpern and Fannie Halpern, his wife, of the other party, under which the Halperns agree to convey certain real estate to Rich upon payment of the sum of \$3,250.00, as follows: \$1,000.00 January 17, 1930, the date of said contract; \$500.00 January 17, 1931, and \$500.00 annually thereafter, with interest at the rate of six and one-half per cent per annum. That on November 28, 1931, the Halperns assigned said contract and conveyed the real estate therein described to the complainant, Lena Miller. That on January 21, 1932, \$500.00 and interest to that



date was paid to said complainant. The bill which was filed September 7, 1933, alleges a default on the part of the defendant in the payment of \$500.00 due January 17, 1933, and interest from January 17, 1932, and all payments maturing thereafter. The defendant for his answer alleges that he did not and could not pay the installment falling due January 17, 1933, because his money was tied up in a closed bank. He denies that the complainant elected to declare the whole sum due; alleges a failure to tender an abstract of title upon request and expresses a willingness to pay interest up to the time the bank was closed but not thereafter. In the hearing the defendant tendered the sum of \$1,537.12, which amount was not accepted by the complainant on the ground that it did not include the attorney's fees and costs. Both attorneys testified respecting the abstract. The attorney for the defendant to the effect that an abstract was demanded by him and the attorney for the complainant denying such demand. Upon a careful examination of the evidence and of the documents submitted, I find the following facts: That on the 17th day of January, 1930, a contract of sale was entered into between David Halpern and Fannie Halpern of one part and Louis Rich of the second part setting forth contract in words and figures as in Exhibit A, attached to complaint."

"I find further that the defendant paid on execution of contract \$1,000.00 and has since paid additional sum of \$1,500.00, together with all interest due up to January 17, 1932; that defendant defaulted in the payment of the \$500.00 which became due on contract January 17, 1933, and in the payment of all interest accruing thereon subsequent to January 17, 1932; that upon such default, the complainant became entitled to foreclose under said contract and, upon the institution of foreclosure proceedings, became entitled to her reasonable attorney's fees; that on May 24, 1935, defendant tendered to plaintiff the full amount of principal and interest claimed by

plaintiff to be due and demanded an abstract of title to said premises. That said tender did not include the court costs or attorney's fees incurred in this suit, and I, therefore find that said tender was and is not sufficient; that the filing of the bill of complaint in this suit constituted an election on the part of the complainant which rendered the entire amount covered by said contract due and payable; that complainant is entitled to her reasonable attorney's fees incurred in this suit; that the sum of \$250.00 is the usual, reasonable and customary attorney's fee; that there is now due from defendant to complainant a total of \$1,800.66, made up of principal, \$1,250.00; interest, \$300.66; and attorney fees, \$250.00, for which complainant is entitled to a first lien on the premises described in the complaint; that the covenants to convey and the covenants to pay, as set out in the foregoing contract, are mutual to the extent that complainant is bound to deliver the deed and an abstract upon payment or proper tender of the full amount due under the contract. It is conceded that the full amount specified in the contract was not paid and it is my conclusion that the only tender on the part of the defendant, disclosed by the evidence, was wholly insufficient; that the equities in this suit are with the complainant; that the complainant is entitled to the relief prayed for in her bill of complaint."

We have examined the evidence as shown by the abstract, and it is our conclusion that the report of the Master, relative to the findings in the case are correct. The Master found that the appellant was in default on his payment, both of principal and interest. He also found that the appellant, during the hearing, tendered to the appellee, all that was due under the contract, including the interest and debt, but that the sum did not include attorney's fees and cost of suit, therefore the amount tendered was not a legal tender. The court found that the Master's report was true and correct and entered a decree in conformity with the Master's findings.

The bill of sale expressly provides that all expenses and disbursements paid or incurred on behalf of the complainant in connection with the foreclosure thereof, including reasonable solicitor's fees, costs, etc., shall be paid by the appellant and shall become an additional charge upon the premises. The evidence shows that the suit was started in good faith and the amount charged as attorney's fees was the usual, customary and reasonable fee to be charged by attorneys in similar cases. It is our opinion that a tender that did not include attorney's fees and costs was not a legal tender.

The appellant also insisted that the bill was prematurely filed because the complainant did not tender to the appellant an abstract showing a merchantable title in herself. We think this objection is not well taken. The rights of the appellant are fully protected by the decree, and it is our conclusion that the trial court's findings of facts and the decree are correct and the same should be affirmed.

Decree Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

1172

38

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in
the year of our Lord one thousand nine hundred and thirty-six,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk. 283 I.A. 630³

RALPH H. DESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
JAN 18 1937 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A.D. 1936

CHARLES A. HARVEY,
(Plaintiff) Appellant

vs.

Appeal from Circuit
Court, Grundy County,
Illinois.

PRICE DEAN,
(Defendant) Appellee.

Wolfe, J.

Charles A. Harvey, the appellant, filed a complaint in the Circuit Court of Grundy County, against Price Dean, his stepson, alleging that he had furnished board, room, lodging and garage space for Dean for a period of five years and that Dean had agreed to pay him a reasonable amount for said board, room, etc., but now refuses to pay him. The appellee, Dean, filed an answer, denying the allegations of the complaint, and stated that he never had boarded with his stepfather, but had boarded with his mother and paid her for his board during the entire time in which the appellant claims he agreed to pay him board.

It appears from the evidence that the appellant, married the appellee's mother January 28, 1928. At the time of the marriage, the appellee was about 20 years of age, and had previously made his home with his mother and had continued to live with her and his stepfather during their married life. The mother died June 3, 1934, and it was for this period of time, that the plaintiff claims that the defendant promised to pay him board and room rent. The case was submitted to a jury, who found in favor of the defendant. A judgment was entered by the trial court on this verdict, and the plaintiff brings the case to this court on appeal.

The appellant first insists that the verdict of the jury is against the manifest weight of the evidence. After reading the evidence, it is our conclusion that the verdict is not against the manifest weight of the evidence, but that the evidence sustains the verdict.

The appellant also insists, that the court erred in giving appellee's instruction No. 1, which is as follows: "The court instructs the jury that if they find from the evidence that the home in which Price Dean, the defendant, was living with his mother was the property of his mother and if they further find from the evidence that Price Dean paid to his mother an agreed price for board during the time that he lived in her home, and if they further find from the evidence that after the death of his mother the defendant contributed his share toward the expense of the common household maintained by the plaintiff and defendant, and if you further find from the evidence that there was no express promise made by the defendant to the plaintiff to pay him any board during the period for which board is claimed by the plaintiff from the defendant, then and in such case your verdict should be for the defendant."

In our opinion, this instruction properly states the law relative to this particular case. We find no reversible error in the case, and the judgment of the Circuit Court of Grundy County, is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

1137

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~~4~~
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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in
the year of our Lord one thousand nine hundred and thirty-six,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

288 I.A. 630'

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 10 1937

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1936,

Frances T. Male, as Administratrix of
the Estate of Frances A. Lovegran, De-
ceased, and as Executrix of the Last Will
and Testament of Godfrey T. Lovegran, De-
ceased,

Plaintiff-Appellee,

Appeal from the Circuit

vs.

Court of Winnebago County

City of Rockford, a Municipal Corporation,
Defendant-Appellant.

Wolfe, J.

This is an action to recover damages alleged to have been caused to the property of the appellee by the construction of a bridge and viaduct across Rock River at east Jefferson Street, in the City of Rockford, Illinois. The work was commenced in January 1927, and the bridge opened to traffic in July, 1928.

At the time of the completion of the bridge, Godfrey Lovegran and Frances A. Lovegran were the owners of two lots, which were located on the northeast corner of Madison and east Jefferson Street. The said lots had a frontage of 132 feet on Madison Street and 156 feet on East Jefferson Street. On these lots was a building containing seven flats or apartments, and another house occupied by tenants which rented for \$27.50 a month. On the rear of the lots was a frame building used for garage purposes. The bridge when completed was about 18½ feet above North Madison Street at the west end of the plaintiff's property and about 7½ feet above the east end of the property.

This suit is brought for the purpose of showing that the bridge, as erected, has damaged and reduced the market value of the property of the plaintiff. The original declaration was filed on January 4, 1929, by the Lovegrans, but since that time both plaintiffs have died and the present plaintiff who is an adopted daughter of the original

plaintiffs, is prosecuting this suit as administratrix of the estate of Frances Lovegran, deceased, and the executrix of the last will and testament of Godfrey T. Lovegran, deceased.

The defendants filed a plea of the general issue. The case was tried in March, 1934, before a jury, which returned a verdict assessing the plaintiff's damages at \$8,000.00. The trial court required a remittitur of \$500.00, then entered a judgment on the verdict for the sum of \$7,500.00. The defendants entered a motion for judgment notwithstanding the verdict. This motion was denied, then a motion was made for a new trial, which was also denied, and the case is brought to this court on appeal.

The appellant first insists that the testimony of witnesses for the appellee, as to the depreciation in the market value of her property because of the construction of the bridge, and included elements of damages for which there could be no recovery, and their testimony should have been stricken, and that the court erred in not striking such testimony, and that the defendant did not have a fair trial upon a proper basis as to damages. The appellee, in her written brief, points out that there was no objection made to this testimony, but it was brought out largely by the attorney for the city upon cross-examination of the plaintiff's witnesses, and that there is no motion to strike such testimony. The appellant in its reply brief says: "Such testimony should have been stricken upon such motion made by counsel for the appellant." This assumes that such motion was made, but the appellant does not cite wherein the record shows any such motion. We have examined the record as abstracted and we find only in one instance was such motion made, and the court sustained the motion and struck from the record the witness' entire testimony. All the other witnesses' testimony stands in the record without objection. It is our conclusion that the appellant is not in a position to urge this assignment of error. What we have said relative to the first assignment of error

is applicable with equal force to the 2nd, 3rd and 4th assignments.

At the request of the plaintiff, the court gave the jury the following instruction: "The court instructs the jury that the Constitution of this State provides that private property shall not be taken or damaged for public use without just compensation; and in this case, if you believe from the evidence, that the property of the plaintiffs was damaged by the construction of the Jefferson Street bridge and viaduct and the approaches thereto, then the plaintiffs are entitled to recover just compensation for such damages, if any." It is insisted that from a consideration of the instruction as given by the trial court, that the question as to what damage was properly recoverable and what damage was not properly recoverable in this case, was not explained to the jury, and further, that the instruction stated that if the jury believed that the property of the plaintiff was damaged in any respect by the erection of the bridge, she was entitled to recover, and that the court erred in giving this instruction. If this instruction were standing alone it would not be sufficient to advise the jury of the measure of damage, if any, that the plaintiff was entitled to recover, but at the request of the defendant, the court gave seven instructions. Instruction No. 4 sets forth fully the measure of damage that the plaintiff is entitled to recover, if at all. The instructions should be read as a whole and not as separate instructions. Taken as a series, it is our conclusion that the jury could not have been misled relative to the measure of damages on which the plaintiff was entitled to recover.

The appellant also complains because the court refused to give its instructions No. 2 and 3 as presented. Instruction No. 2, refers to damages sustained from the diversion of traffic off of Madison Street which is in front of the premises in question. There is no claim for such damages and the court properly refused this instruction. Number 3 relates to the measure of damages to the property, and negatives certain things which the jury should not consider. We think

the other instructions properly state the measure of damage and it was not error to refuse this instruction.

It is seriously insisted that the verdict of the jury is manifestly against the weight of the evidence, and for this reason the judgment should be set aside. As is usual in such cases, the plaintiff introduced a number of witnesses to testify that the property was damaged by the erection of this bridge. They stated their opinion as to the amount of damages. The defendant called in a greater number of witnesses, who testified that in their opinion, the property had not been damaged by the erection of the bridge, but the market value had been enhanced. Such evidence is more or less speculative. In addition to the evidence which was introduced in open court, the jury was taken upon the lots to view the premises and surroundings, so that they could clearly see the location of the bridge and the character of the lot and improvements thereon. It has long been the established rule of court, that unless the verdict of the jury is manifestly against the weight of the evidence, the reviewing court is not justified in reversing their findings. We cannot say that this verdict is against the manifest weight of the evidence.

We find no reversible error in this record and the judgment of the Circuit Court of Winnebago County is here affirmed.

Judgment Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT }ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in
the year of our Lord one thousand nine hundred and thirty-six,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

288 I.A. 631'

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A. D. 1936

Kewanee State Savings Bank
& Trust Company,
Complainant.

vs.

Warren E. Green, et al.,
Defendants.

William L. O'Connell, Receiver
of Kewanee State Savings Bank
& Trust Company,
Appellant and Cross-Appellee

Appeal from the Circuit
Court of Henry County.

vs.

Elizabeth Green O'Neill, Warren
E. Green and John Green O'Neill,
Elizabeth J. O'Neill, George
Edwin Green and Thomas J. Welch,
their Guardian ad Litem,
Appellees and Cross-Appellants.

Wolfe, J.

This cause involves a trust estate created, by the Last Will and Testament of Edwin G. Green, deceased, of the City of Kewanee, Henry County, Illinois, for the benefit of his daughter, son and three grandchildren.

On December 11, 1924, by a decree of the Circuit Court of Henry County, Illinois, in a case entitled Kewanee State Savings Bank & Trust Company vs. Warren E. Green, et al., the Kewanee State Savings Bank & Trust Company, a corporation, was appointed Trustee to carry out the provisions of the Last Will and Testament of Edwin G. Green, deceased. The bank acted as Trustee of the estate until the bank was closed by the Auditor of Public Accounts of the State of Illinois, on February 9, 1933.

On March 27, 1933, the Auditor of Public Accounts appointed William L. O'Connell as Receiver of said Bank. The Court administering the Trust Estate of Edwin G. Green, deceased, is the same court

in which the dissolution suit of the Kewanee State Savings Bank & Trust Company is pending. On November 10, 1933, William L. O'Connell, as Receiver of the Kewanee State Savings Bank & Trust Company filed a report in said trust estate and asked the Court to permit the Trustee to resign and turn over the trust estate to a successor.

Objections were filed by the appellees to this report of the Receiver, based on the ground that the bank as Trustee held during the entire trusteeship, as assets of the trust estate, eighteen shares of its own bank stock, in violation of the express provisions of the will of Edwin G. Green, and had purchased from itself securities which were not sufficiently secured and without any order of court. A full hearing was had on the report and objections and much testimony was taken before the Court. On March 29, 1935, the court entered a final order, surcharging the bank and receiver with the several principal sums, amounting to \$42,050.00 and interest from the date the illegal investments were made, less the deductions for all dividends and interest received and accounted for by the trustee.

On June 28, 1935, William L. O'Connell, as Receiver of the Bank, filed a corrected report covering the period from June 4, 1928, to June 21, 1935, which the Receiver stated was "Made pursuant to the order of this Court on March 29, A.D. 1935, requiring the undersigned to restate the account herein." In this report the Receiver accounted for interest as provided by the terms of the Final Decree of March 29, 1935. On July 12, 1935, objections to this report were sustained for the reason that some of the assets were not accounted for, and the Receiver was ordered to file a corrected report within 15 days.

On September 16, 1935, the Receiver filed another report covering the period from June 4, 1928, to September 11, 1935, and in this report the Receiver accounted for interest only until March 27, 1933, being the date on which he was appointed Receiver. Objections to the report were filed by appellees on the ground that the report did

not comply with the order of March 29, 1935, and did not account for interest as directed by the Court order. On December 4, 1935, these objections were sustained and the Receiver ordered to file a corrected report in 30 days.

On December 4, 1935, William L. O'Connell as Receiver filed a motion to modify the order of March 29, 1935, so as not to require the Receiver to account for interest after the date of his appointment. This motion was denied December 4, 1935. No attempt to appeal from any of the previous orders was made by the Receiver.

On January 6, 1936, William L. O'Connell as Receiver of the bank filed another report, which was the same account he filed on September 16, 1935. On January 16, 1936, objections to this report were filed by appellees, principally on the ground that the report was not in compliance with the final order of March 29, 1935, since the Receiver did not account for interest as directed by the order of March 29, 1935. On March 17, 1936, objections were sustained to the report filed January 16, 1936, and the Receiver directed to file a report within 30 days. The order provides, "Which report will comply with the order and decree of this court entered on March 29, 1935, except that the Receiver shall account for interest, after the date of his appointment of securities and cash lodged with the State Auditor, in the account of the Kewanee State Savings Bank & Trust Company and out of the proceeds received from the assets and securities held by William L. O'Connell as Receiver of the bank belonging to the Edwin G. Green Trust Estate at the time of the entry of the decree on March 29, 1935." On March 30, 1936, O'Connell as Receiver filed a motion to vacate the order of March 17, 1936, which motion was denied.

The appeal in this case is taken from the order of March 17, 1936. Notice of appeal being filed and served on April 17, 1936, more than a year after the final order of March 29, 1935.

The appellees^{have} filed a motion to dismiss the appeal because the

order of March 17, 1936, was not a final and appealable order. The order of March 29, 1935, declares the amount that the Receiver was to account for, and he was ordered to make a report in conformity with that order. Nothing remains to be done in the case, but for him to comply with the decree of Court. If he was not satisfied with the decree, he had a right to appeal to a higher court. He did not see fit to do so within the Statutory period of one year, and he is now barred from prosecuting an appeal from that order.

It is our conclusion that the order of the Court of March 17, 1936 was not a final nor an appealable order, and the motion of appellees to dismiss the appeal should be allowed and the appeal is hereby dismissed.

Appeal dismissed.

STATE OF ILLINOIS, }
SECOND DISTRICT }ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. JESPER, Sheriff.

288 I.A. 631²

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 18 1937 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1936.

Anthony Durka and Mary Durka,
(Complainants) Appellees,

vs.

Anton Wypych and Mary Wypych,
(Defendants) Appellants.

- - - - -

Anton Wypych and Mary Wypych,
(Cross-Complainants) Appellants,

vs.

Appeal from the
Circuit Court
Lake County

Anthony Durka and Mary Durka,
(Cross-defendants) Appellees.

Wolfe, J/

Anthony Durka and Mary Durka, the appellees, filed a bill of complaint for foreclosure of a real estate contract. The appellees had previously sold the property in question, to Anton Wypych and Mary Wypych, the appellants in this suit, for \$27,000.00. The Wypychs deeded a property which they owned, to the Durkas, as part consideration, and were to make monthly payments of \$300.00 per month until the balance of the purchase price was paid. The sale and exchange of property was made in August, 1929. The Wypychs made their regular payments until July 6, 1932, when they only paid \$100.00. Since that date until the suit for foreclosure was started, they have not paid the full amount which was due each month.

To the bill to foreclose, the defendants filed their answer. They also filed a cross-bill, in which they allege that the Durkas were experienced and shrewd dealers in real estate and that the Wypychs were without the advantage of an education or business experience, and had no knowledge of the value of real estate;

that a confidential and fiduciary relationship existed between the parties; that the Durkas reported that the property was valued at 40 to 50 thousand dollars; that a road was going to be built to the property; that the railroad company was going to build a depot and warehouse near the property; that the railroad company was trying to purchase the property; that these representations were false and made for the purpose of deceiving the Wypychs and that the property, at the time it was purchased, was not worth more than \$10,000.00.

The case was referred to the Master in Chancery to take evidence, and report to the court his conclusions of facts and law applicable thereto. The Master found in favor of the Wypychs on their cross-bill. The Durkas filed objections to this report, but were overruled by the Master. The Master then filed his report and the objections were ordered to stand as exceptions. The court sustained the exceptions to the Master's report and entered a decree of foreclosure in favor of the Durkas, and it is from this decree that this appeal is prosecuted.

The appellees have filed their written motion to dismiss the appeal, alleging that the same had not been filed within the time prescribed by the rules of this court. This motion was taken with the case and there is probably some merit in appellees' motion, that the same was not filed in time, but we have considered the case on its merits and have decided that the decree must be affirmed; therefore, the motion to dismiss will be denied, but we do not attempt to pass upon the merits of the motion.

It is first insisted by the appellants that the clear preponderance of evidence, sustained the charge of fraud alleged in the cross-bill. Fraud is never presumed, but it must be established by a clear preponderance of the evidence. The burden was upon

the appellants to prove fraud. They testified to a conversation which took place between Durke and themselves, relative to the purchasing of the property. Durka denied that there was any false representation made in regard to it. In the case of *Hustad v. Cerny*, 321 Ill. 354, the Supreme Court in discussing what representations would vitiate a contract, use this language, at page 359: "Though representations made in the sale of property be not true, if the purchaser has an opportunity to view the property it is his duty to make use of that opportunity. The law charges him with knowledge which he might have obtained by making use of the means afforded him, and where he does not rely upon statements concerning the value of the property and its character but goes upon the land and examines it, relying upon no one's representations as to what it is, it cannot be said that misrepresentations, though made, afford a basis for relief in equity for the reason that they were not relied upon and unless they be concerning matters which the prospective purchaser cannot readily determine upon examination, he will be held to have exercised his own judgment rather than to have relied on the statements of the seller. Representations as to value of property, though exaggerated, do not ordinarily afford a basis for relief where the party claiming to have been deceived has had ample opportunity to learn as to the truth or falsity of the representations."

In the present case, the Wypychs had an opportunity to inspect the property and did inspect it several times. The Durkas didn't conceal anything from the Wypychs. On the premises was a building of thirty-two rooms used for a lodging house and hotel. The Wypychs had previously loaned Durkas \$2,000.00. That appears to be the only business dealing between the parties prior to the sale of the real estate. They had been friends and came from the same community in the old country. The evidence discloses no facts, tending to show a fiduciary or confidential relationship

between the parties. The Wypychs testified that for several months he had the rooms all filled. The examination of the abstracts show his testimony is as follows: "I had it filled up about three months and after three months it went down. At that time, the tannery was working; and after that everybody moved to Chicago. After the tanneries shut down, I didn't do so well." The Wypychs went into possession of the property immediately after the trade was made and stayed in possession all the time and made no complaint in regard to being swindled, until the foreclosure suit was started. It seems to us, this indicates very strongly (and corroborates the appellees) that the false representations charged by the appellants in their cross-bill were not made.

The appellants seriously insisted that the contract provisions for the payment of \$300.00 monthly, under which the foreclosure suit was instituted, were waived. As before stated, the appellants paid their monthly payments until July 6, 1932, when they only paid \$100.00, then the record shows that on August 8, 1932, \$100.00; September 6, 1932, \$380.00; September 22, 1932, \$214.00; November 7, 1932, \$150.00; December 7, 1932, \$100.00; January 6, 1933, \$100.00; February 6, 1933, \$100.00; and February 23, 1933, \$100.00. It will be observed from these records of payments, that there was no regular amount paid each month. During the month of September, Wypychs paid \$594.00, in October he made no payment whatsoever, and in November, he paid \$150.00 and in the other months \$100.00 each. When he offered to make a payment of \$100.00 in March, 1933, the Durkas refused to accept that amount and brought suit to foreclose, alleging that there was over \$1,600.00 due, which included the amount of his delinquency, both in principal and interest, and also money advanced for insurance and taxes.

The court found Durkas by accepting these irregular payments, instead of insisting upon the full amount being paid, did not waive the right to insist on the full payments, but had a right at any time, to demand the full amount of the monthly payment, as stated in the contract. In this, we think there is no error in the court's holding. The trial court entered the usual decree, as in foreclosure proceedings and any rights that Wypychs had in the property are fully protected.

We find no reversible error in the case and the decree is affirmed.

Decree affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in
the year of our Lord one thousand nine hundred and thirty-six,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

288 I.A. 631³

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 13 1937 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A. D. 1936

Nels P. Rasmussen,
Appellant

vs.

From the City Court of
Sterling, Whiteside County,
Illinois.

Catherine Rasmussen,
Appellee.

Wolfe, J.

Nels Rasmussen filed his bill of complaint for a divorce in the City Court of Sterling, charging his wife Catherine Rasmussen with several acts of cruelty, and that on account of such cruelty he was compelled to leave her.

The wife filed her answer to the bill of complaint in which she denied any and all acts of cruelty. She filed a counter claim, in which she alleged that the plaintiff started gambling on the Board of Trade and neglected his farm work; he became heavily in debt; that a judgment was rendered against him; that all his personal property was sold under execution; that the plaintiff assigned the lease on the premises on which they resided, and that the defendant and her family were compelled to leave the home, through a judgment, for forcible entry and detainer; that the defendant importuned the plaintiff to quit gambling on the Board of Trade, but he continued to do so under the name of his minor son; that she was compelled to move from the farm, that she and the plaintiff had been occupying; that the plaintiff, through some arrangement with the party who purchased the personal property at the execution sale, has moved back to the farm and is operating it.

The defendant further alleges that she has always conducted herself as a true, dutiful and affectionate wife and that the plaintiff became angered and left her, for no reason, except,

that she protested against his gambling on the Board of Trade.

The case was submitted to the Court without a jury. Evidence was heard on behalf of the parties. The Court found in favor of the defendant on her counter claim, and against the plaintiff, and entered a decree ordering the plaintiff, Nels Rasmussen, to pay the defendant, Catherine Rasmussen, the sum of \$3.00 a week for support and maintainance. Nels P. Rasmussen, the original plaintiff, has brought the case to this Court on appeal.

The appellant first assigns as error that the court erred in not finding in favor of the plaintiff, as he contends the evidence preponderates in his favor. We have read the evidence of the different witnesses, and have concluded that the evidence strongly preponderates in favor of the defendant, and that the plaintiff failed to establish his case by a preponderance of the evidence.

It is next contended that the counter claim does not state a cause of action for separate maintainance. This point is not well taken. The counter claim charges that Nels Rasmussen became angered and left his wife, for no other reason, except that his wife protested about his gambling on the Board of Trade. We think this charge is sufficient for a separate maintainance action. It is the duty of a husband and wife to live together and for him not to leave her without a reasonable cause. If she has conducted herself as a dutiful wife, then she is entitled to support and maintainance from her husband.

It is further contended by the appellant that the appellee did not prove by a preponderance of the evidence, that the separation was due to the fault of the plaintiff and not her own fault. The evidence in this case is in hopeless conflict. The mother and the children arrayed against the father. A review of this evidence would serve no useful purpose. The Judge who heard this case was in a much better position to pass on the evidence than a Court of Review. He had the advantage of seeing and hearing the witnesses testify.

He saw fit to believe the witnesses for the defendant, rather than for the plaintiff. We cannot say that his findings are contrary to the manifest weight of the evidence. Therefore, we conclude that he properly found that the parties to the suit were living separate and apart, through the fault of the plaintiff, rather than the defendant.

The appellant complains that he is not able to pay anything to help support his wife, and that the court erred in ordering him to pay \$3.00 a week for her support. The witness, Hannah Holland, testified that she saw him on one occasion, take a roll of bills out of the safe; that he bought \$65.00 worth of clothes for some girl, whom he had taken to the State Fair at Springfield. The Court sustained an objection to this testimony at the suggestion of the attorney for the plaintiff, but after this objection was sustained, the plaintiff proceeded to cross examine this same witness and more damaging testimony was brought out on cross examination than in the direct, and this now stands in the record at this time. Plaintiff is a strong able-bodied man. From the whole of the evidence, we do not think the Court assessed an unreasonable amount against the plaintiff for the support and maintenance of his wife. We find no reversible error in the case.

The judgment of the City Court of Sterling is hereby affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of February, in
the year of our Lord one thousand nine hundred and thirty-seven,
within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

288 I.A. 631⁴

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 11 1937

the opinion of the Court was filed in the Clerk's
Office of said Court, in the words and figures following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1936.

PEOPLE OF THE STATE OF ILLINOIS,)
ex rel ARTHUR L. BETOURNE,)
)
Appellee,)
)
vs.) APPEAL FROM THE CIRCUIT
)
CITY OF KANKAKEE, a municipal) COURT OF KANKAKEE COUNTY.
corporation, et al.,)
)
Appellants.)

DOVE, J.

On June 12, 1936, Arthur L. Betourne filed his petition in the Circuit Court of Kankakee County, be which he sought to be reinstated as a member of the Fire Department of the City of Kankakee and to have his name placed on the payroll of that city as of May 4, 1935. The petition as amended alleged among other things that on May 26, 1933, petitioner took an examination conducted by the respondent, Board of Fire and Police Commissioners, and was temporarily appointed by said board as a fireman in the fire department of the City of Kankakee, that thereafter and on August 5, 1933, he was by said board appointed as a permanent member of said department and his name was so posted by said board, that he filed his bond and took the oath as required by law and served as such member from said August 5, 1933, to May 4, 1935. The amended petition set forth an ordinance adopted by the City of Kankakee, which established a department of the municipal

government of that city, known as the Fire Department, which was to consist of one chief of the fire department, one assistant, ten firemen and such other and further members as the City Council may thereafter from time to time by ordinance or resolution provide and averred that petitioner was duly appointed as one of the ten firemen mentioned in said ordinance. The answer of the respondents admitted many of the allegations of the petition but specifically denied that the petitioner was ever appointed a permanent member of the Fire Department and averred that at the time of the alleged appointment, there were no vacancies in said department as the ten men who were then serving in said department had been serving since the adoption of the Fire and Police Commissioner Act by the City of Kankakee on September 28, 1928. The answer further alleged that none of said firemen, so serving, were ever discharged or removed, that no charges had ever been filed against them and therefore there was no vacancy existing to which petitioner could be appointed. After the cause was at issue, a hearing was had resulting in a finding by the trial court that the petitioner, on May 4, 1935, was a de jure officer of the fire department of the City of Kankakee and ordering a writ of mandamus to issue directing the board of Fire and Police Commissioners to restore petitioner to his office of fireman as of May 4, 1935, and directing the other respondents to place petitioner's name on the payroll of the City of Kankakee as such fireman and to pay to him the salary to which he is entitled under the appropriation ordinances of the City. From this order the record is brought to this court for review by appeal.

The pleadings, stipulations of counsel and evidence produced upon the hearing disclose that the City of Kankakee was legally organized under the Cities and Villages act and on September 4, 1928, legally adopted the Fire and Police Commission Act which has been

continuously in force since that time, that a board of Fire and Police Commissioners was duly appointed thereunder and it adopted rules and regulations governing the fire and police departments of the City. By proper ordinance the city established a department of the municipal government known as the fire department, which embraced one chief of the department, one assistant chief, ten firemen and such other members as the City Council may by ordinance or resolution provide. On May 26, 1933, petitioner, with a number of other gentlemen, including Thomas D. Reilly, took a written examination for firemen as required by the act, and on June 7, 1933, filed an oath which was approved by the council and petitioner started to work as a fireman. On May 4, 1935, the Board of Commissioners adopted a resolution suspending appellee, Mr. Reilly, and other persons until the further action of the commission and on July 1, 1935, he was discharged.

The pleadings and evidence found in this record are substantially the same as in the case of People of the State of Illinois, ex rel, Thomas D. Reilly v. City of Kankakee, General No. 9097, which was submitted at the October Term, 1936, of this court and in which an opinion has just recently been filed. There is no necessity for us to re-iterate what we said in that opinion. Official action by a board of Fire and Police Commissioners can only be taken at an official meeting of the board and its records are the only lawful evidence of its action, and the averments of the petition in this case to the effect that petitioner was permanently appointed a fireman are not sustained by the evidence. Petitioner did not show that he was a de jure officer at the time he was suspended and discharged and therefore the trial court erred in rendering the judgment appealed from. The judgment will therefore be reversed.

JUDGMENT REVERSED.

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STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

S. J. Buckner, Edward T. Morris, W. J. Morris, C. I.
Morris and A. H. Buckner, Appellees, v. Morris
Bros. Shoe Company, a corporation, Evan F.
Morris, Richard J. Morris, Alice Morris,
Alice Morris, Executrix of the Estate
of Frank E. Morris, deceased and
Lawrence Jochem, Appellants.

Appeal from Circuit Court, Adams County.

APRIL TERM, A. D. 1936.

Gen. No. 8966

Agenda No. 2

MR. JUSTICE FULTON delivered the opinion of the Court.

On September 16th, 1930, S. J. Buckner, Edward T. Morris, W. J. Morris, C. I. Morris and A. H. Buckner, the Appellees, filed a bill in the Circuit Court of Adams County against the Appellants Morris Bros. Shoe Company, a corporation, Evan F. Morris, Richard J. Morris, Alice Morris, Alice Morris, Executrix of the Estate of Frank E. Morris deceased and Lawrence Jochem asking for an accounting of the amounts claimed due Appellees from Appellants, dissolution of corporation and winding up of its affairs, also for the appointment of a Receiver. All of the above named parties are stockholders of Morris Bros. Shoe Company, a corporation which was located and had its principal place of business at Quincy, Illinois.

On April 9th, 1935, the Court entered a decree upon the bill of complaint, and amendments thereto, the answer of the defendants, replication thereto, the crossbill of defendants, the answer of Plaintiffs to said crossbill, the Master's report of evidence and findings, and the objections of both Plaintiffs and defendants to said report which were made exceptions in the Circuit Court. From that decree this appeal is prosecuted.

The amended complaint alleges principally that the Morris Bros. Shoe Company was organized under the laws of the State of Illinois with a capital stock of \$85,000.00, divided into 600 shares of common stock of the par value of \$100 each and 250 shares of pre-

ferred stock of the par value of \$100 each; that on February 8th, 1916 the Secretary of State issued a complete organization certificate which was duly filed of record in Adams County and from which time said organization has proceeded to transact and carry on its business. On or about June 30th, 1928, the capital stock was increased to 25000 shares common stock, no par value, and 2500 shares preferred 7% stock \$100.00 par value and that of this stock there were issued 13713 shares of common stock, no par value and held as follows:

| | |
|--------------------|-------------|
| F. E. Morris..... | 6930 shares |
| E. F. Morris..... | 220 shares |
| W. J. Morris..... | 2962 shares |
| C. I. Morris..... | 1584 shares |
| E. T. Morris..... | 1351 shares |
| S. J. Buckner..... | 616 shares |
| A. H. Buckner..... | 50 shares |

that prior to this date 279 shares of preferred stock had been issued but now all preferred stock has been retired and the capital stock reduced to 13,713 shares of no par value, however, Edward T. Morris surrendered to the corporation 120 shares held by him reducing his share to 1231 shares and leaving the total capital stock outstanding 13,593; that the stock remained in this condition until some time in 1929 when there was transferred from Estate of Frank E. Morris to Alice Morris 1798 shares and that she is now the owner and holder of said 1798 shares. One share was issued to Lawrence Jochem. That during November 1929, business became unprofitable and the corporation ceased manufacturing and selling shoes and sold most of its assets located at Quincy to International Shoe Company. By virtue of this contract of sale it was entitled to collect certain accounts and one of the complainants, S. J. Buckner, made certain of the collections between November 1929 and May 1930 and was paid for same from the Morris Bros. Shoe Company. The Company, during this period also sold miscellaneous items of its property of stated value and made some expenditures; that large and unnecessary expenses and large and excessive salaries are being paid to the officers of the corporation for performing no services whatever; that the books of the corporation represent their assets to be \$106,773.19 but that their fair cash market value was much less and that certain items of value were not listed on the books; that since the defendants have assumed the

position of officers and directors they have excluded the plaintiffs as stockholders from any participation in management or operation of the corporation and that they refuse to confer with or advise them as to the management or liquidation of the business affairs; that during the years from 1920 down to June 30th, 1928, Frank E. Morris used funds belonging to the corporation for his own personal use in the sum of \$31,141.67 but during 1926, 1927 and 1928 down to June 30th, 1928, made certain payments, leaving a balance now owing the corporation of \$18,907.72, plus interest; that from 1921 down to June 30th, 1928, Evan F. Morris withdrew from the corporation for his own use \$14,371.93 and on June 30th, 1928, after allowing all payments made by him was still indebted to the corporation in said amount; that C. I. Morris withdrew from 1921 to June 30th, 1928, \$3,878.87 and after all credits, owes the corporation the said sum; that these various items, amounting to \$37,158.52, were entered upon the books of the Company as a charge against each of said parties but on June 30th, 1928, F. E. Morris and Evan F. Morris, who were then the chief managing officers, wrongfully caused these sums to be charged to the surplus belonging to the corporation and by that act pretended to pay said overdrafts; that all of the defendants, except C. I. Morris, now have control of the corporation and have refused or neglected to present any claims against the Estate of Frank E. Morris; that C. I. Morris, one of the plaintiffs here, is ready and willing to account to the corporation for overdrafts charged against him; that plaintiffs own shares of capital stock as follows:

| | |
|------------------------|-------------|
| S. J. Buckner..... | 616 shares |
| A. H. Buckner..... | 50 shares |
| C. I. Morris..... | 1584 shares |
| William J. Morris..... | 2962 shares |
| Edward I. Morris..... | 1231 shares |

and that they always have owned said number of shares and are entitled to their proportion of the \$37,158.52 which is wrongfully held from corporation; that they have made demands for the amounts due them and that said sums should carry 5% interest. The bill asks for an accounting, for a dissolution of the corporation and winding up of its affairs and also that a Receiver be appointed.

On June 25th, 1931, defendants filed a joint and several answer admitting the organization of the Company and its officers but deny that they constitute

the whole board, say S. J. Buckner has been a director since January 10th, 1930; admit the capital stock issue of 13,593 shares; say the book value of corporation is \$104,773.19 or was on May 31st, 1930; deny trying to exclude plaintiffs as stockholders; deny excessive expenditures; deny Morris Sr. used \$31,141.67 belonging to Corporation or that he now owes \$18,907.72 or that he ever did owe it; denies that Estate owes anything; deny that Evan F. Morris withdrew from the corporation the sum of \$14,371.93 for his own use or that he is indebted to the Company for any sum whatsoever; that by proper action of the Board of Directors and stockholders all of the indebtedness, if any, of Frank E. Morris Sr., Evan F. Morris and Charles I. Morris had been cancelled and discharged; that even if they were indebted at any time the obligations are now barred by the Statute of Limitations; admit they are now officers in control; admit plaintiffs own the shares of stock set forth in the bill; deny that the charging of items to surplus was done without knowledge and acquiescence of all stockholders but say it was done by the surrender and cancellation of equal amount of preferred stock at its par value under advice of the Securities Department of the State of Illinois in connection with the revision of the capital structure and with full knowledge of the Directors; deny mismanagement of any kind; deny that the corporation has not carried on any business since October 15th, 1929 but say business has been curtailed due to depression; do not want the corporation dissolved but wish it continued under present management.

On June 20th, 1932, defendants filed a cross-bill alleging that on December 23rd, 1931 the parties to this cause entered into a contract to compromise and settle the controversy by plaintiffs paying defendants \$11,000 for their stock in the corporation, plus various taxes, and upon this agreement plaintiffs gave defendants \$1000.00 as earnest money leaving a balance of \$10,000 to be paid within 60 days but the defendants were to transfer, duly endorsed, their shares of stock to Lawrence Jochem, as escrow agent, before January 1st, 1932, to hold same until the balance of money was paid, and that upon the execution of this contract plaintiffs should dismiss this action and that all claims, causes of action and indebtedness would then be mutually settled between all parties; that the cross-complainants were at all times ready and willing to

carry out the said contract on their part but that the cross-defendants after paying the initial payment of \$1000.00 on the contract wholly failed and refused to make payment of the balance due on said contract or to perform the same.

On June 23rd, 1932, cross-defendants filed their answer to cross-bill admitting that on December 23rd, 1931, Frank E. Morris, Jr. purporting to act as attorney for cross-complainants executed such an agreement and that the \$1000.00 was paid to him as earnest money but that said agreement was mailed to Quiney and the defendants living there refused to be bound by it and said Frank E. Morris Jr. was not authorized to act for them and submitted a different agreement which cross-defendants refused saying that it was different. Cross-defendants alleged that all this constituted a rejection and repudiation of the contract.

On June 19th, 1933 the Court referred the case to a Special Master in Chancery for the purpose of taking proofs and reporting the same together with his conclusions as to both law and fact.

On August 4th, 1934, the Special Master in Chancery filed his report to which objection were filed and made exceptions in the Circuit Court. After a hearing on the exceptions the Court entered a decree on April 9th, 1935. In this decree the Court found that Frank E. Morris, during his lifetime, received funds belonging to the corporation amounting to \$18,907.72 which has never been repaid; that the corporation is entitled to a lien on all shares of stock belonging to him or his assignees; the Court further found that the sum of \$1000.00 was paid by Appellees to the Appellants on December 23rd, 1931, for the purpose of carrying out a contract for the purchase of Appellants stock by Appellees; that the attempt to settle and adjust the controversy between them failed and that the Appellees were therefore entitled to recover back the \$1000.00 from Appellants with five per cent interest; also that said \$1000.00 with interest be declared to be a lien upon all the shares of stock, property and assets of the corporation to secure the payment of said sum. It was further decreed that the Appellees have judgment against all of the defendants, except Lawrence Jochem, for said sum of \$1000.00 and interest. The Court also found that from 1921 to June 30th, 1928, Evan F. Morris withdrew from the corporation funds for his own use and benefit, a net total of \$14,371.93, and a lien was awarded on his stock to secure said in-

debtedness. A similar finding was made and lien declared as to C. I. Morris, the amount being \$3,878.87.

Appellants have argued several grounds in support of their appeal. It is first contended that all of the testimony upon which the Court based its findings as against the Estate of Frank E. Morris was given by incompetent witnesses, because Frank E. Morris died on December 24th, 1928, and the hearings in this case were all had several years thereafter; that Chapter 51, Section 2, Smith-Hurd Illinois Annotated Statutes provides, that no person directly interested in the result of a suit, shall be allowed to testify therein of his own motion or in his own behalf when any adverse party sues or defends as the Executor of any deceased person. They point out that the above finding was supported only by the evidence of interested witnesses. An examination however, of the objections filed to the report of the Special Master in Chancery by Appellants, which were made exceptions in the Circuit Court, shows that no such objection was raised or argued either before the Master or in the trial Court and therefore must be considered as waived. *Northern Trust Company v. Sanford*, 308 Ill. 381. *Marble v. Thomas*, 178 Ill. 540. Even though the proper objections and exceptions had been saved, we believe the testimony offered and admitted comes within exceptions two and three of the Statute relied on and was therefore admissible.

It is next contended that the Court was without authority to find and decree a lien in favor of Morris Bros. Shoe Company or of any of the complainants for the reason that no facts justifying the awarding of a lien were alleged or contained in any of Appellees pleadings in the case. An examination of the record discloses that on February 15th, 1935 an amendment to the amended Bill of Complaint was filed by leave of Court, praying that a lien be declared against the shares of stock owned by Frank E. Morris during his lifetime; that a lien be declared upon the shares of stock standing in the name of Evan F. Morris in the amounts due the corporation, with interest. The Bill also contains a prayer for general relief. It is apparent, therefore, that the allegations in the pleading were ample to permit the finding of the Court with respect to declaring a lien.

The Appellants insist that the Court erred in awarding judgment against all of the defendants except Lawrence Jochem, in the sum of \$1000.00, and in de-

declaring a lien for said sum upon the stock and assets of the corporation for the reason that there was no prayer of any kind for any judgment or relief on this phase of the case that consequently the Court was without power to render such judgment.

The cross-bill of the defendants sets forth a settlement agreement on account of which they allege that said sum of \$1000.00 had been paid to Frank E. Morris, Jr., in accordance with the terms of the agreement set forth in the cross-bill, but further answered that there had been a rejection and repudiation of said agreement. The Court therefore found in its decree that the Appellants were indebted to the Appellees on account of money had and received in the sum of \$1000.00, which was paid to the appellants as earnest money for the carrying out of said agreement.

The Court further found that the settlement contract failed and that therefore the Appellees were entitled to recover back the \$1000.00 paid as earnest money. There was a general prayer for relief contained in the amended Bill of Complaint and when the Court found the facts as above outlined, it was perfectly proper for it to find that the \$1000.00 payment be returned and that Appellees have a judgment therefor, as against all the defendants except Lawrence Jochem. A court of equity has the power to adjust the equities between the parties if such adjustment does not contravene the provisions of the Statute. *Johnson v. Muntz*, 364 Ill. 482.

We feel, however, that there was no warrant or foundation in law upon which the Court could decree a lien for such judgment against the shares of stock, property and assets of the corporation. This was a transaction between the shareholders themselves, and the by-laws of the corporation providing for a lien upon its shares of stock for any indebtedness of its shareholders to it, does not apply, because this indebtedness is due to a group of individuals. There was no claim that anything was due and owing to the corporation. The decree incorrectly awarded such a lien.

It is next urged by Appellants that the court was clearly without authority to impress the shares of stock of Morris Bros. Shoe Company with a lien in favor of the corporation. They rely upon the provisions of Section 15, Chapter 32 of Smith-Hurd Illinois Annotated Statutes being the Act known as the Illinois Uniform Stock Transfer Act which reads as follows:

"There shall be no lien in favor of a corporation

upon the shares represented by a certificate issued by such corporation and there shall be no restriction upon the transfer of shares so represented by virtue of any by-laws of such corporation or otherwise, unless the right of the corporation to such lien or the restriction is stated upon the certificate."

Section 2 of Article 14 of the by-laws of Morris Bros. Shoe Company provided as follows:

"Sec. 2. The Corporation shall at all times have a first lien on all the shares of its stockholders and on dividends declared thereon for any and all indebtedness of such stockholders to the corporation."

It is the judgment of this court that section 15 above quoted was enacted for the protection and benefit of innocent purchasers of shares of stock who purchased said shares without notice of the existence of any restriction upon their transfer. In such case there is no doubt that the stockholders would not be bound by any restriction or lien unless a copy of the restriction appears upon the face of the certificate. But in this case all of the defendants, with the exception of Alice Morris and Lawrence Jochem, were officers of the corporation and holders of stock in the Morris Bros. Shoe Company so that they had full knowledge of the existence of the by-law and are not protected by Section 15 of the Uniform Stock Transfer Act. Consequently we believe the Court had the power to impress the shares of stock of Morris Bros. Shoe Company with the lien in favor of the corporation.

The Appellants further contend that the Court was without right or authority to find and decree that the shares of stock formerly owned by Frank E. Morris Sr., and by the corporation transferred to Alice Morris his widow, were impressed with a lien in favor of the corporation. If Alice Morris had been purchasing these shares of stock as a third party or a stranger the principle of law announced by Appellants would have been entirely applicable but Alice Morris received the shares in question as the widow of Frank E. Morris Sr., the deceased president and largest stockholder of the corporation. By operation of law she then occupied the position of an assignee and as such could not receive a better title to the shares of stock than that held by her Assignor. *St. Louis Union Trust Co. v. Wabash C. & W. R. Co.*, 244 App. 466. *Babcock v. Farwell*, 245 Ill. 14. It follows that Alice Morris receiving such shares as widow of her deceased husband took them subject to whatever encumbrances

existed at the time of the death of Frank E. Morris Sr. The Court further found, as a fact, that Alice Morris was not an innocent purchaser of the shares of stock to which finding there seems to have been no objection or exception taken before the Special Master in Chancery. The cases cited by counsel for Appellants in support of their position on this question were all dealing with a purchaser in good faith and for value. The distinction is quite apparent and in our opinion there was no waiver by the corporation of the lien created by the by-laws as to the shares of stock standing in the name of Alice Morris.

Another point presented by Appellants is that the Appellees have waived any right to the lien which they now demand by reason of the payment of the dividend of \$2990.46, paid to all stockholders on April 21st, 1930. To accept Appellants theory it would be necessary for a Court to say that the acceptance of a pro rata distributive share by a stockholder of a dividend rightfully due him bars the right of that stockholder to insist in the future that all monies due the corporation be paid. The payment of the pro rata dividend share to the stockholders was an entirely separate and independent payment of amounts due to stockholders and the receipt of such could not in any way destroy the right of such stockholder from recovering any further sums due to him even though such sums might have to be due at the time he received a former payment.

Appellants assign still another reason why the Appellees are not entitled to any recovery in this cause. They say that the Charge-offs to the surplus account of the corporation occurred on June 30th, 1928 and at that time the company was in the complete and exclusive control of the Management Committee. The active Manager under that committee was the Appellee Buckner. In the effort to effect a re-organization of the company an auditor employed suggested and arranged the charge-off. They further state that Appellees had knowledge of the charge-off of the overdrafts. But it is further shown by the testimony that there was an understanding between all the parties to this suit that notes were to be given to the Appellees herein in order to equalize the advantage enjoyed by any other stock holder as a result of the charge-off of the overdrafts. No notes were ever made or delivered in compliance with this understanding; no effort was made to re-instate the overdrafts on the books of the

corporation and no claims were filed against the Estate of Frank E. Morris or against the other parties liable for the overdrafts. Under these circumstances the Appellees received no consideration for the charge-off or for the amounts due the corporation and certainly as stockholders they were not estopped to bring an action to enforce their rights.

We cannot find any basis for the position of Appellants that Appellees are barred by laches from the prosecution of this suit.

Lastly, the Appellants insist that there is a total failure on the part of the Appellees to establish the liability of Frank E. Morris, Sr., for the alleged indebtedness of the Quincy Spray Painting Company. It is insisted by the Appellees that the Appellants have waived their right to raise this question on appeal, because when the Master found the sum of \$18,907.72 due from Frank E. Morris, Sr., to the Morris Brothers Shoe Company the Appellants made no objection and urged no exception to this finding of fact. The books of the Company showed an account with the Quincy Spray Painting Company on January 1st, 1928, disclosing a debit of \$16746.43. There was no change whatever in the status of the account until June 30th, 1928 when the Spray Painting Company was credited with precisely the same amount and the account balanced. On the same day the Frank E. Morris, Sr., account was debited for \$16,746.43, which increased his total account due the corporation, as shown by the books, to \$18,907.72. While the testimony is not entirely satisfactory we believe there was sufficient evidence in the record to support the finding of the Court that the transfer of the said item to the account of Frank E. Morris, Sr., during his lifetime, constituted an indebtedness of Frank E. Morris, Sr.

This record discloses a controversy over the affairs of a corporation which was controlled largely by members of one family. We are impressed by the arguments of counsel for the Appellants that the indebtedness due to the corporation, and the other facts in the testimony, are not directly challenged but they seek to avoid liability, because of certain irregularities and technicalities in the procedure followed by Appellees. The evidence was taken before the Master, was fully reviewed by the Circuit Court and the main findings of its decree are based upon equity and good conscience.

With the exception of the one error pointed out, the decree in all other respects is affirmed and the cause is remanded with directions to enter a decree in conformity with the views herein expressed.

Affirmed.

(Thirteen pages in original opinion)

1504
Opinion filed Jan. 15, 1937

Abstract

PUBLISHED IN ABSTRACT

The Federal Land Bank of St. Louis, a corporation,
Appellee, v. William J. Leinweber, Nancy B.
Leinweber and George Free, Appellants.

Appeal from Circuit Court, Tazewell County.

OCTOBER TERM, A. D. 1936.

288 I.A. 632²

Gen. No. 9001

Agenda No. 7

MR. JUSTICE FULTON delivered the opinion of the Court.

On February 1st, 1927, William J. Leinweber and Nancy B. Leinweber, his wife, two of the Appellants in this cause, became indebted to The Federal Land Bank of St. Louis, a corporation, in the sum of \$25,000.00, borrowed money. To evidence this indebtedness the two Appellants executed a note for the said sum of \$25,000.00 and delivered the same to the Appellee Land Bank. In order to secure said note and indebtedness, on the same date they executed a mortgage to the Appellee covering 240 acres of land in Tazewell County, Illinois. The payments of both principal and interest were to be made semi-annually on an amortization plan. Default was made in the payment of installments due on August 1st, 1934 and February 1st, 1935. On August 21st, 1935, the Appellee filed a complaint in the Circuit Court of Tazewell County asking for foreclosure of said mortgage because of said defaults. The Appellants were all properly served with summons on August 26th, 1935, returnable on the 3rd Monday of September 1935. On September 9th, 1935, Appellee made an application for a Receiver but no action was taken or Receiver appointed on said petition. On October 23rd, 1935, the Appellants had neither appeared or answered the complaint and an order defaulting said Appellants and referring the cause to the Master in Chancery of said Court for the purpose of taking proofs and reporting his conclusions was filed in said cause. None of the Appellants appeared upon the hearings before the Master in Chancery. On November 6th, 1935, the Master filed his report, notice having been sent to the Appellants of the filing of such report. No objections were filed to said report and no appearance was made in behalf of Appellants when the report was presented

to the Circuit Court. On the same date a decree of foreclosure was entered approving the Master's report, finding that the total amount of indebtedness then due upon the note and mortgage was the sum of \$28,935.26 and constituted a first lien upon the real estate and upon the rents, issues and profits thereof. The usual provisions ordering the Master to advertise and sell and to specify a deficiency, if any, after sale were included in the decree. On November 29th, 1935, after due notice sent to the Appellants the Appellee renewed its application for a Receiver. No appearance or objection being made on the part of the Appellants a Receiver was appointed and promptly qualified. After due publication, on December 6th, 1935, the real estate was sold at Master's sale to the Appellee upon their bid of the sum of \$27,000.00. The Master, in his report of sale, which was filed on December 23rd, 1935, stated that the amount paid at the sale was insufficient to fully satisfy the amount due the Appellee and that there was still due to the said Appellee from the Appellants, William J. Leinweber and Nancy B. Leinweber, the sum of \$2355.87. Before the report of sale was filed by the Master and on December 19th, 1935, the Appellants filed exceptions to the Master's report. On February 16th, 1936, the Appellee filed a motion to strike the exceptions filed by the Appellants. On February 20th, 1936, a hearing was had upon this motion and the Court entered an order allowing the motion and striking the exceptions from the files. On the same date an order was entered by the Court approving the Master's report of sale and for a deficiency judgment against the Appellants, William J. Leinweber and Nancy B. Leinweber in the sum of \$2355.87, with interest thereon at the legal rate from December 6th, 1935. From the date summons was served upon Appellants they were represented by the attorney who filed said exceptions and prosecutes this appeal in their behalf. The appeal was taken from the judgment, order and decree entered on February 20th, 1936.

The exceptions filed by the Appellants on December 19th, 1935, were three in number. The first was formal in character alleging that the Master had reported his conclusions and findings contrary to the law and the evidence in the case. The second exception stated that in July 1935 a statement was made by an Attorney for the Appellee that it would take a deed to the land but this happened while the case was pending in the

Bankruptcy Court in Springfield. Further that on the return day, specified in the summons the Appellants agreed to make a deed to the land but the Attorney for Appellee stated that it preferred to foreclose the mortgage; that later when Appellee filed a petition for the appointment of a Receiver an arrangement was made whereby Leinweber was to turn the land over to Appellee and it was to give him a lease for a year; no Receiver was appointed, the Appellants suffered default and decree was entered. That after Receiver was appointed on November 26th, 1935, a lease was prepared by a representative of the Land Bank and signed by Leinweber in triplicate; that one copy was to be returned to Leinweber by the Appellee, but that it had never been returned; that Appellee, through its attorney, stated that it would not ask for a deficiency judgment if the land did not bring enough to satisfy the mortgage, costs and expenses of foreclosure; that the agent and representative of Appellee, who prepared the lease, stated verbally and in the lease that the Land Bank would not ask for a deficiency judgment; that the Appellants relied upon the representation of Appellee, through its agents, suffered a default and permitted a Receiver to be appointed believing that no deficiency judgment would be asked for or entered by Appellee. The third exception sought credit on the mortgage indebtedness for certain stock in another Land Bank and paid for out of the proceeds of the loan.

Upon a hearing on Appellee's motion to strike Appellants exceptions to the Master's report the Appellants offered to introduce evidence in support of their exceptions filed to which offer the Appellee objected. The objections were sustained and the offer denied. The issue before the Court on the motion to strike exceptions to the Master's report was in law, under the New Practice Act, a demurrer to the legal sufficiency of the exceptions. For the purpose of the hearing on the motion all facts contained in the exceptions were admitted and it was not error for the Court to refuse to admit any evidence on the hearing of such motion.

The appeal in this case appears to be for the purpose of setting aside the deficiency judgment. There is no complaint about the foreclosure or the proceedings taken thereunder. The Appellants rely entirely upon conversations with attorney's and representatives of the Federal Land Bank on which they say in consideration of no objection being made to the fore-

closure or to the appointment of a Receiver that a deficiency would not be asked or entered. This, in effect, is the matter set forth in the exceptions filed by the Appellants. Where parties, represented seek to rely upon verbal agreements with opposing counsel outside of Court and without any record of the same being made in the proceedings in a cause Courts will not set aside orders and decrees duly and regularly entered in the progress of a suit. In this case, Appellants were personally served with summons. The complaint asked, among other things, that in case the proceeds of sale be not sufficient to pay in full the amounts found due Appellee, a deficiency decree be entered in favor of Appellee and against Appellants. At no stage of the proceedings until after sale was made by the Master was there any appearance of any kind in the cause made by the Appellants and no attempt made to protect their rights in the orders and decree of the Court. No motion was made to set aside the original Master's report or the decree of the Court based upon the same, and the filing of exceptions on December 19th, 1935, was too late in time and improper in method for setting aside such foreclosure decree.

The facts contained in the exceptions do not set forth any good defense or reason why the deficiency judgment, entered after the filing of such exceptions, should be vacated and set aside. For the reasons herein expressed the order of the Court entered on February 20th, 1936 sustaining the motion to strike Appellants exceptions to the Master's report and the judgment of the Court will be affirmed.

Affirmed.

(Five pages in original opinion)



102
Opinion filed January 15, 1937

PUBLISHED IN ABSTRACT

Flora B. Dorrah, Plaintiff in Error, v. Orlo Jordan,
Highway Commissioner of the Town of Mt.
Auburn, Christian County, Defendant
in Error.

288 I.A. 632³

Error to Circuit Court, Christian County.

OCTOBER TERM, A. D. 1936.

Gen. No. 9007

Agenda No. 10

MR. JUSTICE FULTON delivered the opinion of the Court.

This is a companion case to the suit of *Mary C. Michael v. Orlo Jordan*, Highway Commissioner of the Town of Mt. Auburn, Christian County, Illinois, General No. 9008, decided at this term. The case involves the right of a Highway Commissioner to borrow money and the question presented by this writ of error is identical with that considered and passed upon in that case.

For the reasons stated in our opinion in that case the judgment of the Circuit Court is hereby affirmed.

Affirmed.

(1 page in original opinion)

Opinion filed January 15, 1937

PUBLISHED IN ABSTRACT

Joseph F. Bohrer, Successor in Trust for the Use of
Charles J. Werner, and Charles J. Werner, Appel-
lees, v. John M. Wohldorf, Appellant.

Appeal from Circuit Court McLean County.

OCTOBER TERM A. D. 1936.

288 I.A. 632⁴

Gen. No. 9013

Agenda No. 14

MR. JUSTICE FULTON delivered the opinion of the Court.

On June 5th, 1935, this action was filed in the Circuit Court of McLean County, Illinois, to foreclose a Trust Deed on real estate owned by the Appellant, John M. Wohldorf, otherwise known as Martin Wohldorf. The Appellant, by his Guardian ad Litem, filed an answer to the complaint alleging that John M. Wohldorf was adjudicated an insane person on January 28th, 1895 in the County Court of McLean County, which adjudication was prior to the execution of a note and trust deed dated March 7th, 1925. The cause was referred to the Master in Chancery who heard the testimony and by his report recommended that a decree be entered finding the note and trust deed null and void by reason of the insanity of John M. Wohldorf at the time of their execution. The Court sustained exceptions to the Master's report and entered a decree of foreclosure, from which decree this appeal is taken.

It is the contention of the Appellant that at the time said note and trust deed was executed John M. Wohldorf had been adjudged insane and that therefore his acts in executing said instruments were void, there having been no legal restoration to sanity. A great deal of space in the briefs of both counsel is devoted to the question of whether or not there is any competent evidence or record establishing the fact that Wohldorf was in 1895 committed to the State Hospital for the Insane at Kankakee, Illinois. Without reciting the detail of such record we believe there is sufficient testimony, documentary and otherwise, to show that in 1895 there was a verdict of a jury and other evidence of record that Wohldorf was actually declared insane and spent a few months in the State Hospital for the Insane at Kankakee. The facts in the case further

show that Wohldorf's father died on July 30th, 1910 and that he came from Oklahoma for the funeral. It is not contended that he spent more than nine months at the State Institution. The Will of Henry Wohldorf, father of the Appellant, devised to the latter the life use of approximately 12 acres of his home farm and also, subject to the life use of his mother, an undivided 1/3 interest in and to 21 acres of land near Shirley, Illinois. On or about the 16th day of January, 1920, the Appellant and his sisters divided this 21 acre tract by agreement and executed quit-claim deeds to each other of the respective tracts. By deed from his sisters, the Appellant acquired title to the tract of land covered by the trust deed sought to be foreclosed. Ever since the death of his father, Wohldorf has lived continuously in and about the Village of Shirley. During that period of time he appears to have lived the ordinary, normal life of a citizen in that community. He has taken care of his own affairs, managed his own property and shown no evidence of mental inability to transact the ordinary business in which he was engaged. His neighbors and friends who were called as witnesses testified that he had been renting out his land, collecting the rents from the same, making improvements and otherwise caring for the premises. Some of these witnesses expressed the opinion that he was mentally capable of looking after his own business affairs and others that they had never seen or heard anything out of the way about the Appellant. It appears that he had, prior to 1925, borrowed money from Jacob A. Bohrer, secured the same by mortgage deed upon his premises, and fully paid the indebtedness. The present mortgage, executed in 1925, was also given to Jacob A. Bohrer, as Trustee for the use of Rudolph Salzman, for the principal sum of \$500.00. It appears further that \$200.00 of this amount was loaned back to Jacob A. Bohrer and by his Estate paid upon the principal of this mortgage. None of these facts are disputed by any testimony on behalf of the Appellant except his own evidence. An analysis of his testimony indicates that he was largely influenced by his interest in the cause and it is quite improbable that his memory was as bad as the record discloses. Charles J. Werner, one of the Appellees, purchased the note sought to be foreclosed from Joseph F. Bohrer and paid \$300.00 for the same about a year prior to the institution of this suit. He was a neighbor of the Appellant and lived about a quarter of a mile distant from the premises.

To sustain the contention made on the part of the Appellant he relies chiefly upon the Illinois Revised Statutes, authorities from foreign jurisdiction and two Illinois cases. The Statute Sec. 12 of Chap. 85 (1935) provides as follows:

“Every note, bill, bond or other contract by any person adjudged insane under the provisions of this act, made after such person has been adjudged insane under this act, shall be void as against such lunatic and his estate, but a person making any contract with such lunatic shall be bound thereby.”

In one of the Illinois cases, cited by Appellant, *Ure v. Ure*, 223 Ill. 454, there was a verdict of a jury and a judgment of the Probate Court finding Robert Ure to be a drunkard and a spendthrift on March 19th, 1897. On March 3rd, 1898, he conveyed his interest in some valuable lots to a grantee in exchange for three practically worthless equities. In that case the Court held that the grantee, Yeomans, did not occupy the position of an innocent purchaser. The fact that Robert Ure had been adjudged incapable of managing or caring for his estate and that a Conservator had been appointed for him were all matters of record of which the grantee was presumed to have notice. The Court held that the conveyance under such circumstances could not be upheld. In the other case, *Morrison v. Beers*, 327 Ill. 139, there was a verdict of a jury on January 11th, 1917, finding Morrison to be a spendthrift and an order of the Probate Court adjudicating him to be such. On appeal to the Circuit Court there was a like adjudication on September 14th, 1918. No Conservator was appointed. On March 8th, 1919, Morrison conveyed the premises in question. On October 21st, 1921, he was adjudicated by the Probate Court to be no longer a spendthrift. The Court held that deed to be void. In each of these cases the conveyance was made shortly after the adjudication in the Probate Court and the testimony of the parties who sought to sustain the deeds was unsatisfactory and unreliable. The situation in those cases was entirely different from the facts disclosed by the record in this case. The Courts of this State have often held that notwithstanding the Statute makes void the contract of a person adjudged insane, yet an agreement made by him during a lucid interval is binding even though there has been no legal restoration to sanity. *Stitzel v. Farley*, 148 Ill. App. 635. *McCormick v. Littler*, 85 Ill. 62. In the case of *Belz v. Peipenbrink*, 318 Ill. 528, the Court said:

“Where judgment of County Court adjudicating testator insane was not rescinded, reversed or superseded, such record, when properly introduced in will contest, was not conclusive on the question of insanity at time of making will, but to be considered by jury only for what it was worth.”

The question involved in this case is therefore whether or not the note and trust deed given on March 7th, 1925, can legally be enforced. So far as the record shows there is nothing to show at that date that John M. Wohldorf was a lunatic or incapable of transacting ordinary business. The testimony does not develop any outward appearances of such a condition and the records do not show that his affairs or estate was in the hands of a Conservator. He was in the exclusive possession of his own property, borrowed money, and built a home thereon, attended to the rental of the same and in the view of his neighbors and the public was the master and manager of his own business affairs. It had been nearly thirty years since the insanity proceeding had been held and we do not think that the Statute quoted was designed to annul contracts, made in good faith, and under the circumstances surrounding the parties interested in this case.

This Court is therefore of the opinion that the decree of foreclosure entered by the trial Court should be affirmed.

Affirmed.

(Five pages in original opinion)

Opinion filed January 15, 1937

PUBLISHED IN ABSTRACT

Charles B. Switzer, Appellee, v. Elden C. Henry, Defendant and Appellant and Jesse Johnson, Defendant.

Gen. No. 9025

Agenda No. 20

Appeal from Circuit Court, Ford County.

OCTOBER TERM, A. D. 1936.

283 I.A. 633

MR. JUSTICE FULTON delivered the opinion of the Court.

On October 13th, 1928, Charles B. Switzer, the Appellee, secured a judgment by confession in the Circuit Court of Ford County on a note signed by Elden C. Henry and Jesse Johnson. The judgment was entered against both defendants for the sum of \$614.23 upon which execution issued. On November 17th, 1928, the defendants made a motion, supported by affidavit of the Appellant Elden C. Henry, to open up the judgment, which motion was granted, defendants given leave to plead, execution stayed, and order by the Court that the judgment stand as a lien until the further order of the Court.

Numerous pleas, demurrers, replications, motions, and bills of particular were filed but on the final hearing the issues tried were upon the claim of Plaintiff based on the note and the pleas of defendant setting forth defenses of no consideration, accommodation paper, set-off and accord and satisfaction. The appellant, Elden C. Henry, claimed affirmative relief on his claim of set-off which the Appellee denied. By agreement of parties a jury was waived and the cause submitted to the court for trial.

In plaintiff's prima facie case he proved the execution and delivery of the note which was for the principal sum of \$337.00, dated February 23rd, 1918, due one year after date, signed by Elden C. Henry and Jesse Johnson; that he was the owner and legal holder thereof, the non-payment of either principal or interest, a computation of the amount due and unpaid and rested his case. He was then called for examination by the defendant as an adverse party and interrogated about an instrument designated Defendants Exhibit 1, which purported to be an account stated between the appellee and appellant, Elden C. Henry, under date of February 16, 1918. The statement was drawn upon

stationery of the Ford Motor Company, for which appellee was the local agent at Piper City, Illinois, and bore the signatures of C. B. Switzer and Elden C. Henry. At the top the statement was labeled, "Henry's Account," on the back of the instrument there was a purported balancing of accounts, showing an amount or balance due to Henry in the sum of \$315.58. The last item shown on the account was dated February 16th, 1918, for one Ford Touring car, \$337.00. The Appellee denied ever seeing this statement before or having any knowledge of its being signed; that he ever met the Appellant, Elden C. Henry, just prior to February 23rd, 1918, for the purpose of going over their respective accounts, or that he ever talked with him about accounts at that time. He further testified that he had never agreed to any such statement and if it was his signature appearing on the bottom of the statement it was placed there before any of the material now appearing on the exhibit was written thereon. His testimony further showed on this examination and in rebuttal that in the spring of 1917, he met Henry on the street one day and discussed their mutual demands; that it was then and there agreed that their mutual claims were nearly even and that their respective accounts should cancel each other and then and there a full and complete settlement, one against the other, was agreed upon; that this was the only transaction in the nature of an accord and satisfaction he ever had between himself and the Appellant Henry. Further, that shortly prior to February 23rd, 1918, he sold to Henry a second hand automobile for \$337.00, and offered to take Henrys' note therefor, provided Henry secured an additional signer or surety on the note; that Henry signed the note and within a day or two procured the signature of Jesse Johnson who was the other defendant in this case but is not an appellant on this appeal. At the time of this transaction Switzer was postmaster and Henry had just secured an appointment as a mail carrier and intended using the car purchased on his mail route. By way of corroboration of his theory of the case, Appellee, on rebuttal, introduced the testimony of A. G. Liebe, another mail carrier, who stated that he had a conversation in the Post Office with Henry shortly after he purchased the car, during the course of which, he asked Henry where he got the means to buy a car and Henry replied, in effect, that he, Henry, could buy a car in the same manner that Liebe had done, by giving a note for it. Also, that in 1924, he heard

a conversation between the Appellee and Henry in the postoffice at Piper City wherein Switzer asked Henry why he could not make monthly payments on the car the same as Liebe was doing, and that Henry replied that he would take care of it and that Switzer would get his money.

The Appellant, Elden C. Henry, testified that for many years prior to 1918, he had sold commodities to the Appellee, and had worked for him at his home and at his garage; that in February 1918, he received an appointment as rural mail carrier; that on the 16th of February he had a meeting with Switzer at the latter's garage for the purpose of figuring up their respective accounts; that they started early in the morning and worked until late in the evening upon the accounts and after they were completely finished both parties signed the statements; that defendant's Exhibit 1, was a copy of a statement made out by Switzer of Henry's account and was in Henry's hand writing; that he purchased a Ford Touring car from Switzer the same day defendant's exhibit 1 was executed for the sum of \$337.00; that he started using the car on his mail route the following Monday; that a day or two later Switzer came to him and told him the car he, Henry, had purchased was a trade in, that he could not deliver a new car just then, that he had to satisfy the purchaser some way, and would Henry give him a note for accommodation to satisfy the customer; that Switzer further said Henry would never have a penny to pay on the note, either by way of principal or interest, and that he never would hear about the note again; that thereupon, Henry signed the note and a day or two later Switzer came back and told Henry the note required security on it and asked him to secure another signer; that he at first demurred but upon being further pressed by Switzer he then asked Jesse Johnson to sign the note and after Johnson had done so he returned the note to Switzer with both signatures appearing thereon; that he never heard anything further about the note until along about 1927, when he sold a car for Switzer upon the promise of Switzer to pay him half of the commission which amounted to about \$125.00; that after making such sale and securing the cash for Switzer he asked the latter to pay him his commission and Appellee replied that he would pay him when he, Henry, paid Switzer. He denied having promised to pay for the car in the presence of the witness Liebe or admitting to Liebe that he had

given a note in payment for the same. All of the material parts of Appellant's testimony was denied by Appellee. Jesse Johnson testified that Henry brought the note out to his farm, asked him to sign, and that it pertained to a car.

The chief controversy in the case arises over Defendant's Exhibit 1. A great deal of testimony was taken by both parties and much space in the briefs devoted to the genuineness of this exhibit. Experts who showed considerable knowledge and experience in examining questioned documents testified on each side of the case but the effect of their proof was pretty much of a draw. In his rebuttal testimony, Switzer admitted the signature at the bottom of the exhibit was his but denied emphatically that the material above his signature was placed thereon before he signed. By reason of this testimony many of the witnesses called by Appellant to prove his signature and much of the testimony of the experts was not controlling. There are many inconsistencies in the testimony of both parties but to recite the detail would unduly prolong this opinion. It would be unusual, indeed, if incidents and conversations happening approximately ten or fifteen years before the trial could be remembered accurately.

Appellant criticizes the trial Court severely for its rulings on the admissibility and refusal of evidence. He first insists the court committed substantial error in refusing Appellant the right in cross examination to ask Appellee about what efforts he had made to collect the note. While there might have been a little more latitude granted Appellant in such examination we can hardly see how they were injured by such refusal. The clear inference from all the testimony is that no effort was made to collect the note except that disclosed in the record and both Appellant Henry and the other maker of the note, Jesse Johnson, were permitted to testify that they heard nothing about the note until the Statute of Limitations was about to expire. Again Appellant says in his brief that a correct decision of this case depends entirely upon the question:

"Did Elden C. Henry erase a writing over the signature C. B. Switzer on defendants Exhibit 1, and then write the present writing above the signature? The entire case hinges on that question. The answer to the question lies in the testimony of Switzer, Faxon, Henry, Keeler, Cavins and the exhibit itself, together with such light as the other facts and circumstances proven may throw upon the question."

With this statement we entirely agree and the questions of law discussed in the brief are merely incidental. The controlling question in the case is one of fact. The statements of Appellee and Appellant are in direct conflict. Appellants complain that defendants Exhibit 1 was not admitted in evidence but the record shows that after repeated offers it was finally admitted subject to objection. Many other offers of proof and documentary evidence were admitted by the court subject to objection but no other ruling was made thereafter and we assume it was admitted by the court and considered by him in making his finding in the case.

Our courts have frequently said that when the trial court saw and heard the witnesses, with the opportunity of observing them while testifying, a reviewing court would attach much weight to the findings of the trial court and would not reverse upon mere questions of fact unless such finding was palpably erroneous. *Baker v. Rockabird*, 118 Ill. 365. In this case it appears to us that the testimony reasonably supports the finding of the trial judge. It would seem strange that Appellant a few days after he had purchased the car and had stated an account with Appellee, would, not only sign a note for Appellee covering the exact purchase price of such car, but would also go out of his way to procure another signer on the note all for the accommodation of the payee. It is further unusual we think if defendants Exhibit 1 had been fully and fairly entered into at the time Appellant purchased the car, that he would not have set up in detail in his affidavit filed in support of motion to open up the judgment, all the facts and circumstances surrounding the account stated which specifically included the purchase price of the car. Apparently all the representations concerning the note being for accommodation only were not made to Jesse Johnson at the time he was asked to sign the note as surety or he would likely have remembered the same. We do not feel that because the evidence in the case was conflicting that we are warranted in substituting our judgment for that of the trial court and for the reasons stated the judgment of the trial court is affirmed.

Affirmed.

(Seven pages in original opinion.)

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PUBLISHED IN ABSTRACT

Arthur F. Lee, Plaintiff-Appellant, v. Nondas L. Lee,
Defendant-Appellee.

Appeal from Circuit Court of Champaign County.

OCTOBER TERM, A. D. 1936.

288 I.A. 633²

Gen. No. 9002

Agenda No. 8

MR. JUSTICE DAVIS delivered the opinion of the Court.

This is an appeal by Arthur F. Lee, Plaintiff-Appellant, from a decree and order of the Circuit Court of Champaign County dismissing his amended complaint for divorce for want of equity.

In his amended complaint he charged Nondas L. Lee, Defendant-Appellee, his wife, with being guilty of habitual drunkenness for a period of more than two years prior to the filing of his complaint; and that in the month of May, 1935, the defendant, Nondas L. Lee, infected the plaintiff, Arthur F. Lee, with a communicable venereal disease; and that on June 15, 1935, said defendant had sexual intercourse with a man, other than the plaintiff, whose name is known to said plaintiff, and that plaintiff is ready and willing to state the name of said person when called upon to do so; that the said Nondas L. Lee committed adultery at other times prior to June 15, 1935, with numerous persons whose names are unknown to plaintiff.

The two errors relied upon for a reversal of the decree and judgment of the court are, that the judgment of the court is against the law and the weight of the evidence on the charge of communicating a venereal disease to plaintiff and is also against the weight of the evidence on the charge of adultery.

No serious attempt was made to prove the charge of habitual drunkenness; both the plaintiff and the defendant were suffering from a communicable venereal disease, and the evidence is not sufficient to lead the court to believe that the plaintiff proved by a preponderance of the evidence that the defendant communicated such disease to the plaintiff. To so hold would be a mere matter of conjecture.

Appellant while admitting that there is no direct evidence of adultery on the part of appellee, or direct evidence of communication of the venereal disease, yet insists that a very sufficient case was made out against

appellee. Where the charge of adultery is the grounds for divorce in a suit brought by the husband against his wife, the proof must be clear and convincing.

"It being important to the well-being of society that the marriage relation should not be severed, where a divorce is sought from a wife for adultery, the proof to warrant a decree must clearly convince the mind affirmatively that actual adultery was committed, as nothing short of the carnal act can lay the foundation for such divorce." *Hoef v. Hoef*, 323 Ill. 170; 153 N. E. Rep., 658; *Blake v. Blake*, 70 Ill. 618.

These parties were married in 1927 and have two children, a boy seven years old and a girl seventeen months old. When plaintiff left the defendant, on June 18, he took the children with him.

The evidence discloses that appellant frequently went to road houses with his wife and that they went whenever they wanted to in the winter time. It also appears that Appellee left her home unaccompanied by her husband night times, which she admits, and states that on the first and third Thursdays of the month she attended the Rebecca Lodge and occasionally on Wednesday evenings during the week they had staff practice. She also testified that she attended various card parties or had gone to shows with some one else. She was an officer in the Rebecca Lodge. The evidence discloses and appellee admits that she had visited the house of Peggy Butts, a person who was the keeper of a disorderly house, on two nights. Appellee testified that Mrs. Butts called her over on two occasions to see if she could not get her father-in-law to make a loan to her. She was there on one other occasion when her husband called for her. Peggy Butts was an old school mate and acquaintance of appellee and her husband. They went to Urbana High School at the same time. On the occasion she was there Mrs. Butts and her husband were there and she was there only twenty minutes. She did not just walk in, as testified to by a witness, but rang the bell.

Appellee testified that she took Peggy Butts and her husband and two girls to a road house near Thomasboro, and they were there about two hours when she took the party back to Champaign. While there she danced with Don Bennett. That there was nothing immoral or improper on her part.

Appellant testified that he knew Don Bennett and had a conversation with him and asked him about

going out with his wife on Saturday night, June 15; I asked him if he would help me out on this and he said: Well would you give me an agreement not to bring suit for alienation of affections against him and after that I gave him the agreement. He said he met appellee at a road house near Thomasboro and that she danced with him a couple of times and that they then got in my car and went south of Thomasboro and then west on a dirt road and parked their car and got out and they had intercourse. There was a written statement made, that was drawn up by my father and signed by Don Bennett, in which he stated that he had taken appellee in a car on a road north of Champaign on June 15, 1935, and indulged in sexual intercourse with her.

All of this incompetent evidence was admitted without objection on the part of the defendant. After the signing of this statement and the making of the declaration by Bennett, the plaintiff took his deposition. After the plaintiff rested his case, without reading the deposition, the defendant stated to the court that depositions were taken on behalf of the plaintiff and that they are now a part of the records of the court, and we want to insist that the deposition be produced and used as evidence. Plaintiff refused to offer the deposition as their evidence. The court refused to compel plaintiff to offer the testimony.

The defendant then offered and read in evidence the deposition of Don Bennett. He denied that there was any truth in the statement made by him, and denied that he had ever had improper relations with appellee. He testified that after he had signed the statement, D. R. Lee, father of the plaintiff, gave him two dollars and a pint of whiskey to induce him to get a date with appellee. He testified that she refused to make a date with him.

Only on one occasion did she dance with any man and she never visited road houses, except in the company of other women, and never made dates or was constantly in the company of any man.

Disregarding the incompetent evidence that was admitted, without objection on the part of appellee, all that remains are the occasions when she admits she visited road houses with other women and the visits to the house of Peggy Butts. Appellee denies specifically that she ever had improper relations with any man and, so far as the evidence shows, she only did what many other women do, visit road houses and dine and dance and occasionally drink.

While her conduct may have aroused suspicion, yet it was explained by her, and no inference of adulterous relations on her part can reasonably be drawn from them, and the charge of adultery must fail.

Appellant was arrested about midnight in Bess Maxwell's place, who ran a house of prostitution, on June 4, 1934, and taken to the police station and charged with visiting and patronizing a place kept and maintained disorderly, where he gave his name as Oscar Dubree, and gave bond, and defaulted and his bond was forfeited.

From a careful consideration of the evidence we are of opinion that it fails to preponderate in favor of appellant, and falls far short of convincing the court that actual adultery was committed by appellee.

For the reasons given the decree of the Circuit Court of Champaign County is affirmed.

Decree affirmed.

(Five pages in original opinion.)

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PUBLISHED IN ABSTRACT

Neal D. Reardon, Executor of the Last Will and
Testament of Francis Gerald Griffin Reardon,
Deceased, Appellant, v. Abraham Lincoln Life
Insurance Company, a Corporation, Appellee.

Appeal from Circuit Court of Jersey County

OCTOBER TERM, A. D. 1936.

288 I.A. 633³

Gen. No. 9010

Agenda No. 12

MR. JUSTICE DAVIS delivered the opinion of the Court.
Neal D. Reardon, Executor of the Last Will and
Testament of Francis Gerald Griffin Reardon, De-
ceased, appellant, sued the Abraham Lincoln Life In-
surance Company, appellee, in the circuit court of
Jersey county on a policy of insurance to recover the
commuted value of the policy, amounting to the sum
of \$5,775.00. The court upon a trial of said cause with-
out a jury found the issues in favor of the defendant,
and judgment was entered on the finding, that plain-
tiff take nothing by his suit and that he pay the costs
in due course of administration. This is an appeal
from that judgment.

The judgment was rendered on June 14, 1935. On
June 22, 1935, and within ten days after final judg-
ment, the plaintiff filed in the office of the clerk of the
circuit court the following motion:

"This 22nd day of June, 1935, comes the plaintiff,
by its attorney, and the court, having heretofore found
the issues for the defendant, the plaintiff moves the
court for a judgment in his favor; and that he recover
damages by him sustained by reason of the premises
in the said complaint mentioned, notwithstanding the
finding of the court, upon the issues above joined be-
tween the parties, and because it appears to him that
the answer of the said defendant is not sufficient in
law, and that the defendant has not fully avoided the
cause of action in the plaintiff's complaint mentioned,
and that judgment ought to be given for the plaintiff,
notwithstanding the verdict or finding of the court."
On January 2, 1936, the court denied the motion of
plaintiff for judgment, notwithstanding the verdict,
and the cause was stricken. This motion of plaintiff is
in the nature of an application for judgment *non ob-
stante veredicto* at common law.

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Sec. 68 (1) of the Civil Practice Act provides:

"It shall be sufficient for the jury to pronounce their verdict, by their foreman, in open court, without reducing the same to writing if it is a general verdict, and the clerk shall enter the same in form, under the direction of the court; and if either party may wish to move for a new trial or in arrest of judgment or for a judgment notwithstanding the verdict, he shall, before final judgment be entered, or within ten days thereafter, or within such time as the court may allow on motion made within ten days, by himself, or counsel, file the points in writing, particularly specifying the grounds of such motion, and final judgment and execution thereon shall thereupon be stayed until such motion can be heard by the court."

This section has no application to cases tried without a jury. The motion did not present to the court for its determination the question as to the sufficiency of defendant's pleadings. It is only when a verdict of the jury has been rendered that a party may move for a judgment notwithstanding the verdict. Nor did the motion have the effect of staying final judgment and execution thereon. After the entry of a final judgment in a case tried without a jury, no question as to the sufficiency of the pleadings can be raised in the trial court. *Stephens-Adamson Mfg. Co. v. Fireman's Ins. Co.*, 257 Ill. App. 443.

Plaintiff filed his notice of appeal on April 2, 1936, in which he specified that he appealed from the judgment of the court entered on June 14, 1935, wherein it is adjudged that plaintiff take nothing by his said suit and that he pay the costs in due course of administration. He also appealed from the order of January 2, 1936, denying his motion for judgment notwithstanding the verdict or finding of the court, and in striking said cause from the docket.

No appeal shall be taken to the Supreme or Appellate court after the expiration of ninety days from entry of the order, decree, judgment, or other determination complained of, except upon order of the reviewing court. Sec. 76, Civil Practice Act; chap. 110, par. 204, Ill. Stat. Bar 1935; Smith-Hurd Ann. St., chap. 110, sec. 200.

The judgment entered on June 14, 1935, was a final judgment effective as of that date, and more than ninety days elapsed between the entry of the judgment on June 14, 1935, and April 2, 1936, when notice of appeal was filed.

The appeal from the judgment of June 14, 1935, not

having been perfected by the filing of a Notice of Appeal within ninety days from the entry thereof, we are without jurisdiction to review the same. The Circuit court of Jersey county did not err in denying the motion of plaintiff for judgment notwithstanding the verdict.

The order of the Circuit court, denying the motion of plaintiff for judgment notwithstanding the verdict or finding of the court, not being a final order or judgment, no appeal will lie therefrom. The appeal from the judgment of June 14, 1935, and the order of the court, of January 2, 1936, denying the motion of plaintiff for judgment notwithstanding the verdict, are dismissed.

Appeals dismissed.

(Three pages in original opinion)



Anna Dachroth, Plaintiff-Appellee, v. William C.
Reimbold, Defendant-Appellant. Earl C. Main,
Defendant.

Appeal from the Circuit Court of Hancock County.

OCTOBER TERM, A. D. 1936. 288 I.A. 633⁴

Gen. No. 9020

Agenda No. 18

MR. JUSTICE DAVIS delivered the opinion of the Court.

Anna Dachroth, plaintiff-appellee, filed her amended and supplemental complaint against William C. Reimbold, in the Circuit Court of Hancock County, praying a judgment of the Superior Court of Cook County, entered on October 29, 1930 in favor of W. C. Reimbold, Jr., and against E. J. Dachroth, G. F. Dachroth and Anna Dachroth for the sum of \$2215.00 and costs of suit, be declared void as against plaintiff. She afterwards made Earl C. Main, Sheriff of Hancock County, a party defendant.

On March 8, 1936, upon a hearing of said cause a decree was entered in which said judgment was declared null and void as to plaintiff. W. C. Reimbold, defendant-appellant, appealed from said decree.

The amended complaint set out that E. J. Dachroth and George F. Dachroth made their certain note to the First Trust & Savings Bank of Nauvoo, calling for the sum of \$2,000.00; that before the maturity of said note said First Trust & Savings Bank of Nauvoo by G. F. Dachroth, cashier, assigned said note to William C. Reimbold; that the note became due on September 6, 1930, but was not paid by either E. J. Dachroth or G. F. Dachroth; that thereafter, the said William C. Reimbold induced the plaintiff, Anna Dachroth, to sign said note and affix her signature on the face thereof after the names of E. Dachroth and G. F. Dachroth; that there was no consideration for plaintiff signing her name to said note; that the said William C. Reimbold knew at the time he induced plaintiff to sign said note that she was not indebted to him, and knew that there was no good and valid consideration for so doing; that after the signing of said note by the plaintiff said Reimbold assigned said note to his son, William C. Reimbold, Jr.; that said William C. Reimbold, Jr., had notice of the absence of any consideration for the sign-

ing of said note by the plaintiff, and also had notice that in so far as said note concerned the plaintiff the same was invalid, and the power of attorney to confess judgment contained therein was likewise invalid.

On October 29, 1930, a judgment was rendered by the Superior Court of Cook County against the plaintiff and E. J. Dachroth and G. F. Dachroth for the sum of \$2215.00; that the same was rendered by confession upon a declaration, cognovit and affidavit of the execution of the note, a certified copy of which declaration, cognovit and affidavit and original note thereto attached is filed with this amended and supplemental complaint and made a part hereof the same as if incorporated herein; that thereafter, on October 4, 1934, there was filed in the office of the Clerk of the Circuit Court of Hancock County, Illinois, a transcript of said judgment, and the Clerk of the Circuit Court issued an execution on said transcript and delivered the same to Ray Mosley, the Sheriff of said county, in which execution the sheriff was directed to collect from the plaintiff and E. J. Dachroth and G. F. Dachroth the sum of \$2215.00 and costs; that said sheriff levied said execution upon real estate belonging to the plaintiff, and advertised the same for sale on December 14, 1934, to the highest and best bidder; that at the time that said William C. Reimbold, Jr., recovered judgment in the Superior Court of Cook County by confession on said note he knew that there was no consideration for the signature of plaintiff thereto, and knew that her signing the same and affixing her signature thereto was done without any consideration whatever, and knew that she was not indebted to his father at the time that she affixed her signature thereto; that, because of the foregoing facts, the entry of the judgment by confession was a fraud upon the rights of the plaintiff, and said Reimbold was guilty of fraud in recovering said judgment against plaintiff, and that the Superior Court of Cook County did not acquire any jurisdiction over the person of the plaintiff; that there was no cognovit filed in the Superior Court of Cook County to confess judgment in favor of William C. Reimbold, Jr., against plaintiff and no cognovit which authorized or permitted the rendition of any judgment in said cause for any amount, and that the attempted or purported cognovit was made the purported basis of said judgment and did not authorize the rendition of any judgment in any amount. Plaintiff demanded judgment against William C. Reimbold, Jr., and prayed that a decree be

entered enjoining and restraining Earl Main, as sheriff, from levying said execution so issued on the premises described in her complaint and from endeavoring to collect said transcript of judgment or any part thereof from the real estate of the plaintiff, and that a decree may be entered declaring the judgment of the Superior Court of Cook County in favor of William C. Reimbold, Jr., against the plaintiff and the transcript thereof to be void, and that said transcript may be cancelled and annulled and that the title of plaintiff to said real estate be relieved from said cloud by a decree of this court.

Appellant contends that the court erred in decreeing that the judgment of the Superior Court of Cook County, the transcript thereof filed in Hancock County, the execution thereon, the levy, sale of real estate and certificate of purchase were all null and void.

Appellee insists that there was no consideration for her signing the note. That the evidence shows that after the note became due, the bank closed its doors and William C. Reimbold began pressing the makers for payment. That the evidence of Reimbold, Sr., the only testimony introduced by appellant on the question, does not show that Mrs. Dachroth signed the note on a promise that the note would not be put in judgment, and even if he had said if you sign the note I will not put it in judgment, it would not be a good consideration because no time was fixed nor was there anything from which it could be inferred, that an agreement to forbear need not be for a definite time, if it shows the parties agreed upon a reasonable time, but one or the other must be present, and in the absence of any agreement not to put the note in judgment or refrain from doing something that would benefit appellee or her sons, there would be no consideration for her signing the note. That appellee having signed the note without consideration the note and power of attorney were invalid as to her and for this reason the Superior Court of Cook County did not acquire jurisdiction of her person in confession of judgment proceeding, and the judgment against her was void. That when a note is given without consideration there is no cause of action under the note. There is no debt and the note is invalid.

Appellee also contends that appellant was also chargeable with notice of lack of consideration and committed a fraud on the court when he confessed judgment. That he having acquired the note after maturity he was not a holder in due course and in law

appellant knew as his father had known that there was no consideration for the signature of Anna Dachroth. The legal effect therefore, of appellant going into court and taking judgment by confession on a note that in law he knew was not the note of Anna Dachroth, amounted to a legal fraud upon the court and rendered the judgment wholly void and subject to collateral attack.

It is also insisted by appellee that the cognovit and other papers filed in the Superior Court as the basis of the confession of judgment were so defective they did not give the court jurisdiction. That a number of blanks were unfilled. The cognovit does not confess judgment nor does it confess that the plaintiff has sustained the damages mentioned in the declaration; that it does not confess judgment for any amount.

It is a well settled rule that a court of equity will grant relief against a judgment which is against conscience, or the justice of which can be impeached by facts, or on grounds of which the party could not avail himself, at law, or of which he was prevented from availing himself by fraud, accident, or mistake. While a court of equity will relieve against a judgment procured by fraud, accident or mistake, no aid will be extended merely for errors intervening in the progress of the cause or the entry of the judgment. *Alleanza Italiana v. Carmela Papa, et al*, 204 Ill. App. 343. A court of equity has the undoubted power to entertain a bill to impeach a decree or judgment of any court obtained by fraud, and if the allegations and proof are sufficient the decree or judgment may be vacated. *French v. Thomas, et al*, 252 Ill. 65, 96 N. E. 564.

Courts of equity will not, however, set aside a decree upon the ground that it was obtained by false evidence, but only for fraud which gives a court colorable jurisdiction over the defense presented. As in all other cases, where fraud is alleged, the proof must be clear and satisfactory. *Evans v. Woodsworth*, 213 Ill. 404, 72 N. E. 1082.

Want of consideration for the signing of a note is a matter of defense on the trial of the cause in the case of a judgment obtained by confession by virtue of the authority contained in a power of attorney should be raised by a motion to open up the judgment and for leave to plead and cannot be taken advantage of by a complaint in chancery. In this case the judgment was entered in the Superior Court of Cook County on October 29, 1930, and the levy was made on October 26,

1934, on the property of plaintiff, on the execution issued on the transcript of judgment, and it is contended by appellee that she had no knowledge of such judgment until that time. There is proof however by appellant that on December 26, 1930, Anna Dachroth was served with a summons, complaint, affidavit of attachment, undertaking and writ of attachment in an attachment proceeding instituted in the District Court, Second Judicial District, in the State of North Dakota, wherein W. C. Reimbold, Jr., was plaintiff and Anna Dachroth, et al, were defendants, which appellant claims was a suit upon the Cook County judgment. Only the writ of attachment was introduced in evidence, which did not refer directly to the judgment of the Superior Court of Cook County. The suit was between the same parties and the amount claimed was \$2,235.00.

The testimony of Mrs. Dachroth was very unsatisfactory as to when she first heard about the judgment taken in the Superior Court of Cook County. She is quite old and apparently forgetful, and the fact that she had learned of the judgment within the last few months prior to the taking of her deposition on August 16, 1935, was elicited by leading and suggestive questions on the part of her attorney. G. F. Dachroth, son of appellee, testified that he heard that a judgment had been taken on the note in Chicago, Illinois. That he was in Joliet because of trouble arising with his connection with the Nauvoo bank. He was served with something and knew some proceedings had been taken on the note. We are of opinion that plaintiff failed to prove, by a preponderance of the evidence, the allegation in her complaint, that she had no notice of said judgment until the pretended transcript thereof was filed in Hancock County, Illinois, and a levy made upon her real estate on October 26, 1934.

In her charge that appellant committed a fraud on the court when he confessed judgment because he acquired the note after maturity and was not a holder in due course and in law he knew as his father had known that there was no consideration for the signature of Mrs. Dachroth, appellee assumes that there was no consideration while the evidence discloses this to be a controverted question, appellant claiming that Mrs. Dachroth placed her signature on the note for a good consideration and appellee denies such claim. Appellant committed no fraud upon the court by taking a judgment by confession against appellee because of

the fact that he was not a holder of the note in due course and was therefore charged with the knowledge that, as claimed by appellee, the note and power of attorney were void as to her.

In the case of *Ward v. Durham*, 134 Ill. 195, 25 N. E. 745, where a claimant filed his claim against an estate, our Supreme Court in its opinion said: The complaint is, that she did not inform the court of facts which would, it is said, have defeated her claim,—in other words, did not herself interpose the defenses which the executrix and her attorneys, through negligence, had seen fit to waive. It is not pretended that the note had in any way been paid or satisfied. There was nothing immoral, unjust or inequitable in her collecting it, if the makers or their representatives chose to pay it or waive defenses to it.

To entitle a defendant to relief against a judgment or decree on the ground of fraud, accident or mistake, it must be made evident that he had a defense on the merits, and that such defense has been lost to him, without such loss being attributable to his own omission, negligence or default. The loss of a defense, to justify a court of equity in removing a judgment, must in all cases be occasioned by the fraud or act of the prevailing party, or by mistake on the part of the losing party, unmixed with any fault of himself or agent.

Mere irregularity, or the insisting upon rights which, upon a due investigation of those rights, might be found to be overstated or over estimated, is not the kind of fraud which will authorize a court of equity to set aside a judgment.

Even though it be conceded that there was no consideration moving to appellee for placing her name upon the note, and appellant knew that fact, he could not be charged with perpetrating a fraud upon the court by taking judgment, as want of consideration is a defense which might or might not be interposed and that could be taken advantage of by a motion to set aside the judgment and for leave to plead. We are of opinion that appellant did not perpetrate a fraud upon the Superior Court of Cook County in obtaining the judgment.

As for the contention of appellee that the cognovit and other papers filed in the Superior Court of Cook County as a basis of the confession of judgment were so defective they did not give the court jurisdiction, it appears from the certified copy of the declaration and cognovit filed with and made a part of appellee's amended and supplemental complaint that judgment

was entered by confession at the October Term, 1930, of the Superior Court of Cook County, and on the 29th day of October. A declaration was filed together with a *cognovit* in which Anna Dachroth appeared by Arthur U. Maina, her attorney, and waived service of process and stated that she could not deny the action of plaintiff.

The same presumptions will be indulged in favor of a judgment by confession entered in term time upon a *cognovit* as are indulged in the case of original judgments of courts of general jurisdiction. There being no bill of exceptions filed in the case the presumption arises that the necessary proof was introduced to sustain the judgment. When a court of general jurisdiction has proceeded to adjudicate and render judgment in a matter before it, all reasonable intendments will be indulged in favor of its jurisdiction. *Boyles v. Chytraus*, 175 Ill. 370, 51 N. E. 563.

It is a settled rule of law that the record of a court showing a judgment by confession in open court, imports verity, and can not be contradicted by parole evidence. The record of such judgment is the only proper evidence of itself, and is conclusive evidence of the fact of the rendition of the judgment, and of all the legal consequences resulting from that fact, both as against the parties to the judgment and all others whose interests may be affected thereby. *Weigley v. Matson, et al*, 125 Ill. 64, 16 N. E. 831. In the absence of a bill of exceptions the presumption is that the court heard testimony as to the amount due and that the evidence heard by the court was ample to sustain the judgment. *Miller v. Glass*, 118 Ill. 443, 8 N. E. 833.

The record in this case shows that a declaration was filed by the plaintiff and a *cognovit* by Anna Dachroth, by her attorney Arthur U. Maina, waiving service of process, and admitting that she could not deny the action of the plaintiff, nor that he had sustained damages on the occasion of the non-performance of the several promises in the declaration mentioned, and although the *cognovit* did not confess judgment for any stated amount the presumption is that the court had before it the note and warrant of attorney and proof of the execution thereof and all other facts necessary to the entering of the judgment.

We are of opinion that the circuit court of Hancock county erred in entering the decree declaring null and void the judgment of the Superior Court of Cook County, as to appellee. The decree is therefore re-

versed and the cause remanded to the Circuit Court of Hancock county, with directions to dismiss the complaint for want of equity.

Reversed and remanded with directions.

(Ten pages in original opinion.)

Harold E. Pinnell, Plaintiff and Appellee, v. O. L. Langellier, doing business under the name and style of Langellier Motor Company, Defendant and Appellant, and Everett K. Brooker, Defendant.

Appeal from Circuit Court of Logan County.

OCTOBER TERM, A. D. 1936.

288 I.A. 633⁵

Gen. No. 9026

Agenda No. 21

MR. JUSTICE DAVIS delivered the opinion of the Court.

This is an appeal by O. L. Langellier, doing business under the name and style of Langellier Motor Company, one of the defendants and appellants, from a judgment for \$1200.00, entered in the circuit court of Logan county, in favor of Harold E. Pinnell, plaintiff-appellee, and against the appellant and Everett K. Brooker, defendant.

The defendant Brooker resided at Mt. Pulaski, Illinois, and was engaged in handling Texaco products and running a Texaco filling station. On February 13, 1935, he left there in a 1934 Ford V-8 automobile to drive to Delavan, Illinois. After passing Hartsburg, Illinois, on the way to Delavan he collided with a car driven by Frank E. Stevenson, in which plaintiff-appellee was riding. Appellant was not in the car driven by Brooker, nor was he at the scene of the accident. The plaintiff charges that the motor vehicle was then and there driven and operated by Brooker as agent or servant of appellant.

Appellant by his appeal raises the question of agency and insists that the defendant Brooker was an independent contractor and not agent or servant of appellant, and that, even had Brooker been agent or employee of appellant, still at the time of the happening of the accident he was not acting in the scope of his employment.

Appellant had been operating a Ford agency at Lincoln, Illinois, under the name of Langellier Motor Company. On August 18, 1934, he entered into a contract with the defendant, Everett K. Brooker, which was headed "Sub-Dealer's Agreement," authorized

by the Ford Motor Company. It contained several numbered provisions, and the Langellier Motor Company was called "Dealer," and the defendant, Brooker, was called "Sub-Dealer."

Provision, numbered 1, of the contract reads:

"(1) The dealer will sell and sub-dealer will buy Ford automobiles, trucks and chassis at a discount of fifteen percent (15%) from the established price list, f.o.b. Detroit; sub-dealer to handle cars taken in trade, if any." Other provisions of the contract were in relation to Ford parts, free service, maintenance of place of business, signs and advertising, and cancellation and other provisions which had no bearing on the relation existing between appellant and the defendant Brooker. It was executed by R. L. Langellier on behalf of the Langellier Motor Company and by Everett K. Brooker. R. L. Langellier was manager of the Langellier Motor Company, of Lincoln, Illinois.

It appears from the evidence that, on the morning of February 13, 1935, Brooker went to Lincoln to the place of business of the Langellier Motor Company with Page Waddell, who lived at Mt. Pulaski. Brooker and the Langellier Motor Company had traded with Waddell for the 1934 Ford, V-8 automobile, that Brooker was driving at the time of the accident. Waddell delivered it to the Langellier Motor Company for a 1935 two-door V-8 Ford. They had traded with Waddell about two weeks before. Mr. Langellier appraised the car. Brooker took the 1934 Ford back to Mt. Pulaski, that had been traded for. A man by the name of Blackford, shortly after he heard that Brooker had traded with Waddell, said he was interested in that automobile, knowing the car. He told Brooker he wanted him to demonstrate the car, and Brooker took it back so he could demonstrate it to Blackford.

Robert Langellier gave Brooker permission to take the auto and to sell it the best way possible. When Brooker asked him about taking the car, he said: "Yes, go right ahead." Brooker had told him about Blackford. Any cars that Brooker owned he paid for the gas and oil used, but he did not always pay for the upkeep and maintenance of cars he was selling for other people. He generally went out to try to sell a car, and then brought it back. He received a slight commission, and any cars that Langellier had on the floor he allowed Brooker to sell on a commission basis. When he got back to Mt. Pulaski he met Blackford in the afternoon and got him and drove out with him a distance of about four miles, and Blackford said he

could not stay any longer, and said they were going to Delavan that night and he would drive the car some more.

Between 6:30 and 7:00 o'clock Brooker, Fred Lipp, Fred Zimmerman, Cecil McVey and Henry Blackford started to go to Delavan. They got to Lincoln and picked up Daniel Cummings. These boys were an independent basket ball team and they were going to Delavan to play basket ball. There were generally seven on the team. It was organized in the fall of 1934, and during the winter they played a number of games in surrounding towns. Brooker usually took them. The team was called Texaco and had "Texaco" on their uniforms and Brooker loaned them the money to buy their uniforms. Brooker was not manager of the team but was very much interested in the team advertising the Texaco business. It was very foggy that night and it was almost impossible to see. Fred Zimmerman and Blackford and Brooker were in the front seat, and the other three boys were in the back seat. Blackford said he would a little rather Brooker would drive being it was a rather bad night and he would drive home, but he did not drive the car.

It is evident from the testimony that the 1934 Ford car that defendant was driving at the time of the accident was the property of the Langellier Motor Company and that Brooker had obtained the car from appellant to find a buyer for the same. At the time the trade was made with Page Waddell about two weeks before the delivery to him of the 1935 two-door Ford V-8 car, Langellier appraised the 1934 Ford V-8 car and fixed the price at which it was to be taken, and when the new car arrived he telephoned Brooker to bring Waddell and get the new car. The new car was delivered to Waddell and, upon request of Brooker, Robert Langellier permitted him to take the 1934 Ford to sell and so far as this particular transaction was concerned Brooker, in the sale of the car, acted as the agent of the Langellier Motor Company. In the case of *Nelson v. Stutz Chicago Factory Branch*, 341 Ill. 387, 173 N. E. 368, it is said:

"The general rule is, that one who is injured by another's negligence must pursue his remedy against the person whose negligence caused the injury. Where, however, the relation of master and servant exists between the person guilty of the negligence and another sought to be held for the resulting damages, the negligence of the servant may be imputed to the master, and he may be held liable for the resulting damages if the

servant guilty of the negligence was at the time acting in the master's business and within the scope of his employment. Outside the scope of his employment the servant is as much a stranger to his master as any third person."

From a careful consideration of the evidence we are of opinion that at the time of the accident Brooker was not acting within the scope of his employment. He was taking members of a basketball team in which he was very much interested to Delavan where a game was scheduled.

Henry Blackford was one of the occupants of the car and a member of the team. He was an occupant of the car because he was a member of the team and was going to Delavan to play, and any arrangements that might have been made by Brooker for him to drive the car as a prospective purchaser was only incidental to the purpose of the trip and could in no way have been any part of any business transaction in which appellant was interested. *Canavan v. Canavan*, 271 Ill. App. 558.

It is admitted that the court did not err in entering judgment against the defendant, Everett K. Brooker, on the verdict of the jury; but the court erred in entering judgment on the verdict against the defendant, O. L. Langellier. We are of opinion that the verdict of the jury as against the defendant, O. L. Langellier, is contrary to the manifest weight of the evidence and that the evidence fails to disclose that at the time of the accident the defendant, Everett K. Brooker, the driver of the car, was acting in his master's business and within the scope of his employment.

Our conclusion is that the judgment of the circuit court of Logan county must be reversed as to the defendant, O. L. Langellier, and sustained as to the defendant, Brooker. Since the adoption of the Civil Practice Act the rule that a judgment against two or more is a unit and, if reversed as to one must be reversed as to all, does not hold good. *Fogel v. 1324 North Clark St. Bldg. Corp. et al*, 278 Ill. App. 286.

Section 92 (f) of the Civil Practice Act, Chap. 110, Par. 220, Sec. 92 (f) Ill. State Bar Stats. 1935. Smith-Hurd Ann. St. Ch. 110, Sec. 216 (f) provides in part as follows:

"In all appeals the reviewing court may, in its discretion and on such terms as it deems just,—"

"(f). Give any judgment and make any order which ought to have been given or made, and make such other and further orders and grant such relief, including a

remandment, a partial reversal, the order of a partial new trial, the entry of a *remittitur*, or the issuance of execution, as the case may require."

The judgment of \$1,200.00 rendered by the Circuit Court of Logan county against O. L. Langellier and Everett K. Brooker is reversed as to said O. L. Langellier, but affirmed as to said Brooker.

Judgment reversed as to one defendant but affirmed as to the other defendant.

(Six pages in original opinion.)

Opinion filed January 15, 1937. 902

PUBLISHED IN ABSTRACT

J. Wilbur Lupton, Administrator of the estate of
Lowell Gene Lupton, deceased, Appellee, v.
H. A. Bonser, Appellant.

Appeal from Circuit Court, Shelby County.

OCTOBER TERM, A. D. 1936.

288 I.A. 634'

Gen. No. 9004

Agenda No. 9

MR. JUSTICE RIESS delivered the opinion of the Court.

This is an appeal from a judgment in the sum of \$5,000.00 rendered by the Circuit Court of Shelby County in favor of J. Wilbur Lupton, Administrator of the estate of Lowell Gene Lupton, deceased, the Appellee, hereinafter referred to as the Plaintiff, and against H. A. Bonser, the Appellant, hereinafter referred to as the Defendant. Recovery was had by the Plaintiff for the benefit of the next of kin of Plaintiff's intestate Lowell Gene Lupton, in an action arising out of the alleged negligent operation of Defendant's automobile, resulting in the death of said named decedent.

The complaint consists of four counts: the first charging general negligence and the third alleging several specific charges of negligence. The second and fourth counts, upon which verdicts of not guilty were returned, charged the Defendant with wanton and reckless misconduct in operating the automobile in question.

The third count charges the defendant with carelessly, negligently and improperly operating his automobile at a speed greater than was reasonable and proper, having regard for the condition of the traffic and the use of the way, and so as to endanger the life or limb or injure the property of other persons; with negligent failure to keep a reasonable lookout for other persons using said public highway; to give reasonable warning of his approach to plaintiff's intestate; to use every reasonable precaution to avoid injuring him at the time and place in question, and in so negligently failing to have his automobile under proper control, so as to avoid unnecessary injury to the person or property of others using said public highway.

Defendant filed his answer making denial of all said charges. Verdict was returned by the jury finding defendant guilty under the first and third counts and assessing plaintiff's damages upon which the judgment was rendered.

Lowell Gene Lupton, the Plaintiff's intestate, was a male child between five and six years of age. He lived with his father, J. Wilbur Lupton, who sues as Administrator herein; his mother and his two minor brothers at their farm home located five and one-half miles west of Shelbyville and situated about twenty rods south of Route No. 16, a concrete State highway, passing at that point between Shelbyville and Tower Hill, a village five miles west of the lane leading into the Lupton home. The paved portion of the state highway is eighteen feet wide, with a black line painted down the center thereof. Robinson Creek crosses the highway at right angles about a quarter of a mile east of the Lupton home, and Robinson Creek hill is located about a half mile west of the Lupton home; the highway across the bottom being straight, with fences or guard rails located on each side of the concrete highway and from three to four feet distant therefrom. The Lupton rural mail box is located on the opposite or north side of the highway from the Lupton home and lane leading thereto.

On February 22, 1935, Lowell Gene Lupton, with his brother Carl, aged eleven years, Clyde and Russell Furr and two other boys started to walk home from the district public school located on a road leading south from the highway and lying about sixty rods east of the Lupton home.

M. S. Deere of Tower Hill overtook the boys on the school road with his Chevrolet truck, and permitted them to ride with him northward to the State highway and thence west along this highway toward their respective homes. The truck stopped at a point on the north side of the highway near the Lupton mail box and opposite the lane or driveway leading into the Lupton home. Lowell Gene Lupton and Russell Furr were riding in the cab with Mr. Deere, and the other boys rode in the body of the truck to the rear. The truck stopped on the right side of the highway, with its right or north wheels off of the pavement and with its south wheels remaining on the pavement; leaving a distance of about four feet between the left or south side of the truck and the center line of the highway.

The Lupton boys got off of the right side of the

truck; Lowell Gene getting out of the open cab door while his brother Carl climbed off of the truck body in the rear. While attempting to cross the highway from the north to the south side on which the Lupton lane is located, Lowell Gene Lupton was struck while on the south half of the pavement by a Ford VS car driven by the defendant Bonser, then travelling in an eastward direction, and was instantly killed.

Defendant Bonser with his wife, Mr. and Mrs. Elmer Stine and Harry Storm, had spent the earlier portion of the day in Springfield, and were on their way home. They were travelling east on Highway No. 16 in defendant's car.

The evidence on the part of the plaintiff shows that the defendant testified at the Coroner's inquest that he was driving at the rate of fifty-five or fifty-six miles per hour at the time of the accident; that he saw the truck stop along the highway, and that he thought there might be somebody fixing a tire; that he said he did not stop his car because there was another car close behind him, and he was afraid of the lives that he had in his car.

M. S. Deere, driver of the truck, testified that he stopped his truck at the place in question; that the front door was open; that at the time he stopped the truck he saw two cars approaching from the west; that after the boys had gotten out of the truck he started his truck, and had gone approximately one hundred feet when he met the car operated by the defendant; that he heard Clyde Furr scream when he was about ninety feet from where he had first stopped his car. Clyde and Allen Furr at the time were riding in the back end of his truck. He immediately stopped his truck and found plaintiff's intestate lying at the south edge of the pavement. After striking Lowell Gene, the automobile carried the body about one hundred and twenty-five feet east of the Lupton lane. There was broken glass at the south edge of the highway where plaintiff's intestate had been struck; the right head light of the defendant's automobile had been broken, and the right side of the front end of the automobile bent in.

After the accident and after Mr. Deere had stopped his truck, which he testified only took a few seconds; the defendant's car and the car which was behind him had gone east about a quarter of a mile from the place of the accident.

Allen Furr, who was in the truck, testified that at the time of the accident, the defendant's automobile

was travelling between fifty-five and sixty miles per hour; that he heard the defendant testify at the Coroner's inquest that he was going from fifty-five to fifty-six miles per hour; that he did not put on the brakes on account of a car following him; that he saw a truck parked and he thought there was a man out fixing a tire or something; that two cars passed one hundred to one hundred and fifty feet apart; that Lowell Gene's body was lying on the pavement about one hundred and thirty five feet east of the lane; that there was broken glass at the lane.

Clyde Furr, who was riding in the truck, testified that Carl and Gene Lupton got off at the mail box; that after the truck started he looked through the glass and saw the defendant's car coming; that the defendant's car was on the south side of the black line; that he yelled to Deere when about ninety feet east of the lane and Deere stopped; that after defendant's car passed, he saw the deceased lying on the highway along the south edge; that he heard no horn sounded.

Bert King testified that the defendant passed him on Route No. 16, between a half and a quarter of a mile from the place of the accident; that in his judgment, the defendant was driving between fifty and sixty miles per hour, and that they continued to drive at that rate of speed until after the accident.

A number of witnesses testified that the defendant at the Coroner's inquest stated that he was driving between fifty and fifty-six miles per hour, at the time of the accident; that his brakes were in perfect mechanical condition; that they had been checked that day in Springfield, and that he was afraid to apply his brakes because another car was following him.

These witnesses further testified that the defendant stated that he noticed the Chevrolet truck door was open, and that he believed someone was fixing a tire.

The evidence in behalf of the defendant consisted of the testimony of the parties riding in his automobile at the time of the accident. The defendant testified in his own behalf. No specific objection was interposed to his testimony on the ground that the plaintiff was suing in his representative capacity.

J. Elmer Stine, an occupant of the defendant's automobile, testified that defendant was operating his car at a speed of forty miles per hour at the time of the accident; that the plaintiff's intestate and his brother stepped from behind the truck directly in the path of defendant's automobile, and that the truck prevented

him from seeing plaintiff's intestate until he stepped from behind the truck. He did not testify as to whether or not the defendant sounded his horn.

Harry Storm, an occupant of defendant's automobile, testified that when defendant's car was passing the truck, the two Lupton boys stepped from the Deere truck on to the highway.

Mrs. Vida Stine, also an occupant of the defendant's car, testified that the truck began to move just as they reached it; that defendant sounded his horn as they approached; that the defendant was operating his car over forty miles per hour; that the two boys stepped directly from behind the truck.

Mrs. Bonser, wife of the defendant, testified that the two boys came from behind the truck immediately prior to the time plaintiff's intestate was struck and the boy jumped ahead of their car, and that she did not know the truck was moving when they passed it.

The defendant testified that he had been operating an automobile since 1923; that he was riding in the front seat; that at the time of the accident he was driving about forty miles per hour; that as he got opposite the truck, it began to move west; that he saw the truck with door open as he came close to it; that as he got opposite the truck the two boys darted from behind the truck toward the middle of the pavement; that he applied the brakes when sure of collision; that as he approached the truck he sounded his horn; that he often traveled and was familiar with the highway and territory at the place of the accident and had previously visited the home of the Luptons.

The testimony on behalf of the plaintiff, on the whole, tends to prove that the defendant was driving between fifty-five and sixty miles per hour at the time of the accident; that he observed a truck stopped on the highway as he approached with the right door open, and that he believed someone was fixing a tire; that no horn was heard by the witnesses.

The evidence on behalf of the plaintiff further shows that the truck had moved approximately one hundred feet before it met defendant's car, which fact would have enabled the defendant to have seen plaintiff's intestate on the highway, and which might have enabled him to turn his car to avoid striking him or to have slowed his car to such an extent as to have permitted the boy to step off the highway.

The evidence on the part of the defendant tended to show that the defendant was operating his automobile

at the rate of forty miles per hour; that he sounded his horn; that the plaintiff's intestate stepped directly from behind the truck into the path of his automobile; that he applied brakes just before striking the boy. It was strictly within the province of the jury to settle all the questions of fact. It is for the jury to weigh the evidence and determine where the preponderance lies, and their findings will not be disturbed unless they are contrary to the manifest weight of the evidence.

Under the state of this record, the Court cannot say that the verdict was contrary to the manifest weight of the evidence. The evidence was conflicting and it is therefore necessary that the record be free of substantial error.

Complaint is made to the giving of plaintiff's instructions numbered 1, 2, 6, and 7.

Instruction No. 1 refers to the alleged duty of the driver of a motor vehicle on a public highway to "keep a reasonable lookout to observe persons, including children, who may be on the highway." Instruction No. 1 does not place children in a separate class from other persons. In view of other instructions given, the reference, by inclusion, to children was not prejudicial.

The objection to Instruction No. 2 undertaking to define due care must be considered in connection with the latter part of Instruction No. 1 and with defendant's Instructions No. 11, 14, 15, 16, 17, 18, 19, 20, and 24, as a series, rendering harmless the objection complained of. It does not undertake to state facts nor to direct a verdict.

Instruction No. 6 making reference to the statute concerning the driving of a vehicle at a speed greater than reasonable, having regard to the traffic, use of the highway, etc., should be considered in connection with defendant's given instructions 20 and 25, and other instructions upon the same subject, and when so considered is not subject to the objections complained of; nor does this instruction undertake to recite facts or direct a verdict.

Instruction No. 7, after reciting certain duties of the defendant set forth in the negligence counts, requires that the jury believes "from a preponderance of the evidence in this case" that at and just prior to the time of the accident in question, defendant failed to observe either one or more of such duties before "he may be found guilty of negligence." Several of the same propositions of law are covered in the defend-

ant's instructions in making application thereof to alleged facts and charges of negligence in the complaint.

It may be observed that the element of proximate cause omitted in plaintiff's instruction No. 7 was likewise omitted from defendant's instructions No. 19, 14, 15 and 16; hence the defendant cannot complain on this ground. *Gannon v. Kiel*, 252 Ill. App., 550 (559); *McInturf v. Ins. Co. of N. A.*, 248 Ill. 92 (99); *Witmer v. Curry*, 206 Ill. App. 318; *People v. Popovich*, 295 Ill., 491 (497). The rule was also fully and correctly given in defendant's instruction No. 24.

Defendant's given instruction No. 11 expressly cautioned the jury to consider the instructions together as one entire series, each to be considered in connection with all other instructions on the same subject. *Fleming v. City of Chicago*, 260 Ill. App., 496; *Foote v. Chicago North Shore and M. P. Co.*, 256 Ill. App. 581.

This Court is of the opinion that the errors complained of were cured by instructions given for the defendant, several of which are subject to the same objections. and by further correct instructions which cure and render them harmless.

Defendants refused cautionary instructions No. 37 and 38 were fully covered by defendants given instructions No. 10, 12, and 13, and it was not error to refuse them.

In answer to questions by defendant's counsel and on cross examination of defendant, it was disclosed that he was engaged in the insurance business, but neither by such questions nor by any answers thereto was any reference or disclosure made as to whether or not he carried any liability or other insurance; hence there is no force to this objection by the defendant.

Complaint is also made to certain remarks to the jury in the argument of plaintiff's counsel to which objection was made and sustained by the Trial Court and the jury was instructed to disregard the statement. In the opinion of this Court, the statement was not of such nature as to have influenced the verdict of the jury.

Finding no reversible error in the record, the judgment of the Circuit Court of Shelby County will be affirmed.

Judgment Affirmed.

(Nine pages in original opinion)

Charles Elmer Phillips, Appellee, v. The Travelers
Insurance Company, Hartford, Connecticut,
Appellant.

Appeal from Circuit Court, Christian County.

OCTOBER TERM, A. D. 1936.

238 I.A. 634²

Gen. No. 9012

Agenda No. 13

MR. JUSTICE RIESS delivered the opinion of the Court.

This is an appeal from a judgment in the sum of fifteen hundred dollars rendered by the Circuit Court of Christian County against the defendant, The Travelers Life Insurance Company, appellant herein and in favor of the appellee, Charles Elmer Phillips, who was the plaintiff below. The cause was heard by the Court upon waiver of a jury.

The complaint charges in substance that the defendant company issued and delivered its Certificate of Insurance No. 51700 to the above named plaintiff on May 18, 1932, under the terms and conditions of a Group Life Policy No. G 6619, previously issued to plaintiff's employer, the National Dairy Products Corporation, in which certificate the defendant company promised to pay to the plaintiff \$1500.00 in the event of total permanent disability prior to the age of sixty; that on April 14, 1934, the plaintiff became wholly disabled by bodily injuries and disease, and became and was thereafter wholly prevented from engaging in his usual line of employment, and will be so permanently prevented for life from engaging in any occupation or employment for wages or profit; that the plaintiff performed all conditions precedent entitling him to payment of said certificate according to its terms. Attached to the complaint is a copy of the certificate of insurance issued by the Defendant company to the plaintiff.

Defendant's answer denies that the plaintiff is permanently disabled within the meaning of the certificate, and specifically denies that the plaintiff furnished the defendant with "due proof" that he had become wholly and permanently disabled by injuries and bodily disease, and was thereby prevented for life from engaging in any occupation or employment for wages or profit.

It appears from the evidence that the defendant company on the first day of July, 1930, had issued Policy No. G 6619 to the National Dairy Products Corporation, by the terms of which policy the defendant company agreed to insure the lives of employees of said Corporation, its subsidiaries, and affiliates, and to insure such employees against total disability as defined in said insurance policy; that it also issued group accident and sickness policy G A 2028 to said Dairy Products Corporation and affiliated corporations, by the terms of which it insured all of the employees of said company from loss of time due to accident or disease, for a period not exceeding thirteen weeks.

Under the terms of said group policies, the plaintiff, an employee of said dairy company, was issued the aforementioned Certificate No. 51700, by the defendant company, effective May 18, 1932, which provided for payment of insurance totalling \$1500.00 in the event of death or permanent disability under terms of Group Policy No. G 6619, and weekly benefits in the sum of \$15.00 per week, which might arise from sickness or non-occupational accidents for a period of thirteen weeks under the terms of said group accident and sickness policy No. G A 2028. The premiums due under his employee's certificate were regularly deducted from the plaintiff's wages.

The plaintiff developed a varicose condition of the veins in both legs and ceased his employment on account of said condition on April 15, 1934. Thereupon, he was paid by the defendant company the sum of \$15.00 per week for thirteen weeks under the terms of said Group Accident and Sickness Policy No. G A 2028, which was referred to in his Certificate No. 51700, and which payments were mailed to him by the National Dairy Products Corporation.

At the trial, the plaintiff introduced testimony tending to show permanent disability as defined in Group Policy No. G 6619. The pertinent provisions of said policy with reference to permanent disability benefits, which are set out in the plaintiff's certificate, are as follows: "If an employee shall furnish the company with due proof that while insured under this policy and before having attained the age of sixty, he has become wholly disabled by bodily injuries or disease, and will be permanently, continuously and wholly prevented thereby for life from engaging in any occupation or employment for wage or profit, the company will waive further payment of premium as to such em-

ployee and pay in full settlement of all obligations to him under this policy the amount of insurance in force hereunder upon his life at the time of the receipt of due proofs of such disability, in a fixed number of installments chosen by the employee, the first installment to be paid immediately upon receipt of due proofs of such disability. Any installments remaining unpaid at the death of the employee shall be payable as they become due to the beneficiary designated by such employee. Such remaining installments may be commuted into one sum on the basis of interest at the rate of three and one-half per cent per annum."

The Group Accident and Sickness Policy No. G A 2028, under the terms of which the thirteen weeks temporary disability was paid, contains no precedent condition requiring "due proofs" to the company in case benefits are claimed by the employee, as is expressly required under the terms of said Policy No. G 6619.

A provision in an insurance policy requiring "due proof" of claim, requires reasonable proof of conditions upon which claim under the contract is based but does not require any particular form of proof. *Zorger v. Prudential Ins. Co.*, 282 Ill. App. 444.

Whether or not the plaintiff had in fact become wholly disabled by bodily injuries or disease, whereby he will be permanently and continuously prevented for life from engaging in any occupation or employment for wages or profit became strictly a question of fact to be determined by the Trial Court, since the evidence on that question conflicting. From an examination of the record, we cannot say that the finding of the Trial Court therein was contrary to the manifest weight of the evidence. *Zorger v. Prudential Ins. Co.*, *Supra*; *Touloupas v. Equitable Life Assurance Society*, 286 Ill. App., 136.

However, it was also necessary as a condition precedent to recovery under the permanent total disability policy in evidence and referred to in his certificate that the plaintiff furnish the defendant company "due proof" that while insured under this policy and before having attained the age of sixty, he had become wholly disabled by bodily injuries or disease, and thereby prevented for life from engaging in any occupation or employment for wages or profit.

The uncontradicted testimony shows that the plaintiff, through his wife notified his employer of his condition, but it is not shown that the facts given to his employer were communicated to the defendant company. Plaintiff's physician testified that he furnished

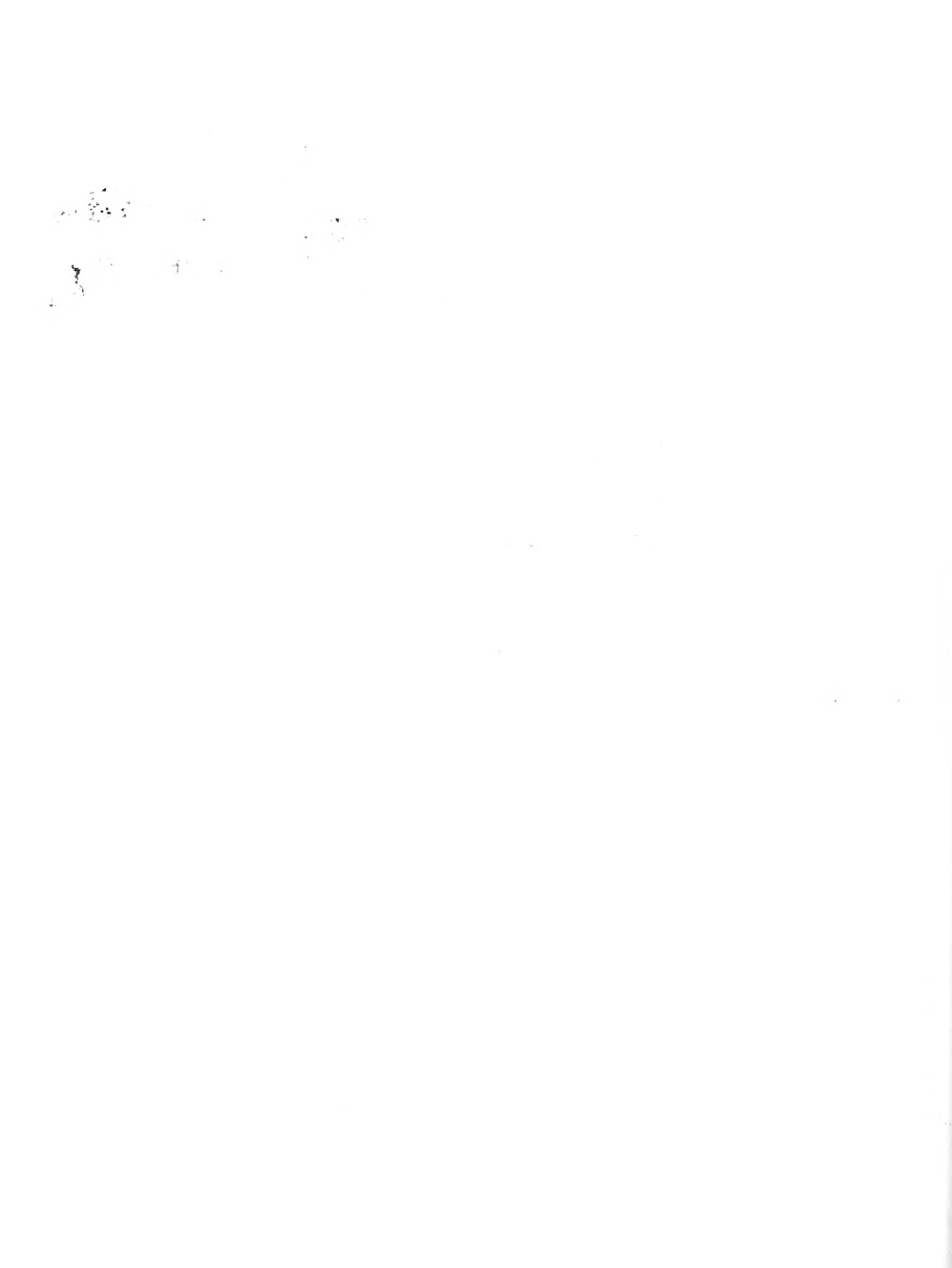
reports to either the employer or the defendant company, but could not say which. While proof to the insurer may in some instances be more or less informal, still such proof or a waiver thereof must appear from the record before the assured is entitled to recover under the terms of his policy. *Zorger v. Prudential Ins. Co., Supra; Touloupas v. Equitable Life Assurance Society*, 286 Ill. App., 136.

Whether or not such evidence is available to the plaintiff does not appear. Having failed, however, to either prove compliance on his part with such condition of the policy precedent to his right to recovery, or to show facts constituting a waiver by the defendant, the plaintiff has failed to make out a case of liability against the defendant company under the certificate in evidence.

The judgment is therefore reversed, and the cause remanded.

Reversed and remanded.

(Four pages in original opinion)



604
Opinion filed January 15, 1937.

PUBLISHED IN ABSTRACT

**Nelson Weber, doing business as Weber's Garage,
Appellee, v. Interstate Dispatch, Inc., Appellant.**

Appeal from Circuit Court, Sangamon County.

OCTOBER TERM, A. D. 1936.

288 I.A. 634³

Gen. No. 9017

Agenda No. 16

MR. JUSTICE RIESS delivered the opinion of the Court.

This is an appeal by the defendant from a judgment in the sum of \$198.71, entered in favor of the plaintiff upon the verdict of a jury in the Circuit Court of Sangamon County. The case was originally tried, and a judgment for said amount was rendered before a justice of the peace, from which an appeal was taken by the defendant to the Circuit Court.

The plaintiff Nelson Weber contended that William Earl Norris, while indebted to the plaintiff, sold a tractor to the Interstate Dispatch, Inc., defendant appellant herein, in violation of the Bulk Sales Law of Illinois; said tractor being, at the time of such sale, more than the major portion of the merchandise, fixtures, goods, and chattels of Norris's business, and not so sold in the ordinary course of trade in said business. That the Interstate Dispatch, Inc., failed to pay or notify Norris's creditors of the purchase of said property, in violation of the provisions of the Illinois Bulk Sales Law.

It is contended by the defendant that the verdict of the jury was manifestly against the weight of the evidence; that the lower Court erred in denying the motion for a directed verdict in favor of the defendant; in entering judgment against the defendant, and in denying the motion for a new trial.

The evidence shows that in the fall of 1934, and in the spring of 1935, Norris was engaged in a trucking business in Springfield, Illinois, and that he used a tractor and semi-trailer in conducting his business. In the fall of 1934, the tractor and trailer were wrecked. It was repaired at a cost of \$298.71, by the plaintiff, Weber, of which \$100.00 was paid in cash by Norris, leaving a balance due the plaintiff, Weber, on the bill of \$198.71. The amount of the bill was not contested at the trial. The sole contention of the defendant was that the tractor and trailer were sold by

Norris to H. H. Hiland, personally, and not as President of and for the defendant company.

The plaintiff testified that the tractor and trailer in question were sold to the Interstate Dispatch, Inc., of Chicago, by Norris during the month of May, 1935, after Norris had incurred the above bill, for which suit was brought.

Later, the witness Weber was asked from what source he had learned that Norris had sold the truck to the Interstate Dispatch. His answer, to the effect that Mr. Norris had told him, was objected to and excluded. The witness then proceeded to testify without objection that he had talked to one of the employees of the Interstate Dispatch named Farrand, and that this witness had told him the same thing.

The witness further testified that he had never received from the Interstate Dispatch, Inc., or any of its officers or directors a statement by registered mail, as required by the Bulk Sales Law, that they intended to buy the equipment of William Earl Norris. He further so testified that he heard H. H. Hiland, President of the Company, testify before a justice of the peace at a previous trial, that he had not obtained an itemized list of creditors from Norris at the time the equipment was purchased. These facts were later admitted by H. H. Hiland, President of the Company, on cross-examination.

Plaintiff also offered in evidence a Certificate of Title issued by the State of Missouri to William Earl Norris showing that on May 24, 1935, the certificate was assigned by Norris to an unnamed assignee.

H. H. Hiland testified on behalf of the defendant, that he was President of the defendant company, the Interstate Dispatch, Inc., that he had known Norris for two and a half years; that Norris hauled freight for his company between Chicago and St. Louis for eighteen months or two years; that the Interstate Dispatch, Inc., is engaged in motor trucking transportation. He further testified that he personally purchased the tractor and equipment from Norris, and that the Interstate Dispatch, Inc., had nothing to do with the transaction. He identified a bill of sale purporting to have been executed on May 24th, 1935, by which Norris conveyed to H. H. Hiland all the right, title and interest of William E. Norris to Interstate Tractor No. 850 and highway trailer No. 22901, together with all accessories and appliances in connection with the equipment. The bill of sale further provided that H. H. Hiland was to liquidate Norris's ac-

count of \$125.00 with the Firestone Service Stores of Springfield, Illinois, and to complete payment on the tractor amounting to \$596.00 to the International Harvester Co. The bill of sale was signed by William E. Norris and witnessed by W. L. Wilcox.

Hiland further testified that he paid a balance of \$596.00 due to the International Harvester Company on said tractor, and offered in evidence a receipt from said Company to him personally for \$100.30. Also a letter, a receipt and a note from the Fruehauf Trailer Company; the letter being addressed to William Norris, showing satisfaction of all their claims against the trailer. Hiland testified that these papers were handed to him by Norris at the time he bought the trailer.

The witness further testified that the Interstate Dispatch, Inc., was doing business at 2250-56 South Lumber Street, Chicago, and that the names, H. H. Hiland and Interstate Dispatch, Inc., appear on the door, and that he was doing business as an individual at the same address, and operated a number of trucks.

On cross-examination he was asked if he had paid Norris by check or cash. He stated that he did not remember whether it was check or cash; that he did not have the check in Court; and that he had come down from Chicago to testify at that trial, but did not know what the trial was about when he came.

On cross-examination, the witness was asked if he had produced before the justice of the peace the paper marked "Exhibit 1" (being the bill of sale), to which he replied: "I don't think I did." He was further asked if he did not testify before the justice of the peace that the Interstate Dispatch Company bought the trailer from William Earl Norris and his reply was: "I couldn't say yes or no about that."

Charles Perego, an employee of H. H. Hiland, testified that he was familiar with the truck owned by William E. Norris; that Norris sold it to H. H. Hiland; that he is still employed by Mr. Hiland, who is President of the Interstate Dispatch, Inc., on the freight, but that his check is always signed by H. H. Hiland personally, and not by the Interstate Dispatch, Inc.

In rebuttal Nelson Weber testified that Hiland, in his testimony before the justice of the peace said there was no bill of sale, but a Certificate of Title; that the title was to the Interstate Dispatch. Norris was not present and did not testify.

Harold Malgreen in rebuttal also testified that Hiland made the following statement, under oath, be-

fore the justice of the peace: "That no bill of sale was made, but a Certificate of Title was delivered; that the Certificate of Title was endorsed to the company he represented, the Interstate Dispatch." The Certificate of Title issued by the State of Missouri to William Earl Norris was also offered in evidence. The assignment on the back of the Certificate of Title shows that the assignment was signed by Norris on May 24th, 1935, to an unnamed assignee.

It is earnestly contended by the defendant that the verdict in this case is contrary to the manifest weight of the evidence.

The evidence on behalf of the plaintiff, including all inferences which may reasonably be drawn therefrom would, if standing alone, amply support the verdict in this case.

The testimony of Hiland and his documentary evidence standing alone would make a complete defense to this action.

True, the defendant offered in evidence a purported bill of sale dated May 24, 1935, purporting to convey all interest in this equipment to H. H. Hiland, but on the trial of this case before the justice of the peace, the bill of sale was not produced and was not mentioned in the direct testimony of H. H. Hiland. On the contrary, the evidence shows that he then testified that there was no bill of sale and that the Certificate of Title had been assigned to his company, the Interstate Dispatch, Inc. Further, on cross-examination in the Circuit Court, he did not deny that he had made such statements.

The testimony of the President of the defendant Company before the justice of the peace might well have been considered by the jury as binding on the defendant. It may be further noted that while a receipt from the International Harvester Company was produced, showing payments by said Hiland; the witness, Perego, testified that payment for his services rendered to the defendant company was also paid by the personal check of said Hiland. Furthermore, Hiland testified that he did not remember if Norris was paid by cash or check and that he did not have the check in court. Such cancelled check, if one was in existence, would have been material to the issues in this case. Where facts material to the issues are within the knowledge of the party to the cause and opportunity is afforded such party for the disclosure of such facts, but is not availed of, a presumption arises that such evidence, if given, would have been unfavorable to him. *Page v. Keeves*, 362 Ill., 64.

In this conflicting state of the record, it was peculiarly within the province of the jury to pass upon the credibility of the witnesses, and the probative value of the evidence offered therein.

After considering all of the evidence and the inferences that could reasonably be deduced therefrom, we cannot say that the verdict in this case was against the manifest weight of the evidence. The jury and Trial Judge were in a better position to consider and pass upon the question of the credibility of the testimony, and the findings of the jury approved by the Trial Judge should not be disturbed on appeal, unless they appear to be manifestly against the weight of the evidence. *Doerr v. City of Freeport*, 239 Ill. App., 569 (568); *Freeman v. Chicago & J. Elec. Ry. Co.*, 208 Ill. App., 350.

The judgment will therefore be affirmed.

Judgment affirmed.

(Six pages in original opinion)

Opinion filed January 15, 1937

PUBLISHED IN ABSTRACT

**Lillian Young, Appellee, v. United Cab and Drivurself,
Incorporated, doing business as Yellow Cab
Company, and Peter Palmisano,
Appellants.**

Appeal from Circuit Court, Champaign County.

OCTOBER TERM, A. D. 1936.

208 I.A. 634

Gen. No. 9035

Agenda No. 23

MR. JUSTICE RIESS delivered the opinion of the Court.
This is an appeal by the defendants from a judgment in the sum of \$1500.00 in favor of the plaintiff, rendered in the Circuit Court of Champaign County, on the verdict of a jury, for personal injuries sustained by the plaintiff. The plaintiff, Lillian Young, was struck and injured on the fifth day of October, 1935, by a taxi cab owned by defendant, United Cab and Drivurself, Incorporated, doing business as Yellow Cab Company and driven by its servant and co-defendant, Peter Palmisano.

The amended complaint consists of three counts. The first count charges general negligence; the second count charges that the taxicab driver carelessly, negligently and improperly drove, managed, and operated his said motor vehicle at a high and dangerous rate of speed at the place of the accident, to-wit: forty-five miles per hour; the third count charges that the taxicab driver carelessly, negligently and improperly drove, managed and operated his said motor vehicle on said public highway and approached the plaintiff without giving any reasonable warning of the approach of his cab, without having used every reasonable precaution to avoid injuring the plaintiff, and without stopping his said motor vehicle until he could safely proceed along and upon said public highway.

Each defendant, answering severally, denied all charges of negligence averred in the complaint, and charged that the plaintiff, while crossing said public street, carelessly and negligently collided with the taxicab, and thereby proximately contributed to her injuries, and further charged that the plaintiff was guilty of contributory negligence in crossing the paved portion of said public street at a point other than a

cross walk as defined by par. 172, Section 75, Chapter 95½, Smith-Hurd 1935 Revised Statute. A reply filed by the plaintiff denied all contributory negligence as set forth in said answers. The case went to the jury on the issues made by the above pleadings.

It appears from the testimony that the collision occurred about 11:30 at night, on October 5, 1935, near the intersection of First Street and East Springfield Avenue, in the city of Champaign, Illinois. East Springfield Avenue is thirty-six feet wide, paved with concrete, and extends east and west. First Street is forty feet wide, paved with concrete, with a black line down the center, and is a part of State Bond Issue Highway No. 10, extending north and south, at the point where it intersects Springfield Avenue. The sidewalk on the north side of Springfield Avenue is five feet in width and it is 2.7 feet from the south sidewalk line to the north curb line of Springfield Avenue on the west side and on the east side it is 3.3 feet from the south line of said sidewalk to the north curb line of Springfield Avenue. The distance between the inside of the concrete portion of the walk and the property line is not given.

The plaintiff testified that on the night of October 5, 1935, at about 11:30 P. M., she was walking south on the west side of First Street; that she started to cross First Street where it intersects Springfield Avenue, and in so doing, walked directly east; that before she left the curb and also after she had taken several steps into the street, she looked both north and south, and saw dim headlights about a block and a half or two blocks south of First Street; that she proceeded east across First Street, and when she was approximately at the center of the street, she looked north and was struck by the taxicab before she had time to again look south.

Joseph Modjeski, a student of the University of Illinois, on behalf of plaintiff, testified that he was walking south on the west side of First Street near the intersection of First Street and Springfield Avenue at the time of the collision, and that he saw the plaintiff at the time the taxicab struck her. He testified that she was in front of the cab and that the front end and bumper on the left side of the cab, which was going north, struck her; that the plaintiff was thrown in the air and a little west of the cab. He further testified that the headlights were out at the time of the collision, and that he heard no horn sounded. He said the plaintiff was picked up about fifteen feet north of the north

curb of Springfield Avenue, and that she was about eight feet north of the point where he first saw her. He estimated the speed of the taxicab between forty and forty-five miles per hour, and placed the plaintiff's position seven or eight feet north of the north curb line of Springfield Avenue at the time he first observed her. He said that he heard the brakes applied immediately after the plaintiff was struck by the taxicab, at about the center or a bit east of the center of First Street; and that after plaintiff was struck, her body was a few feet west of the point of collision.

Beulah Featherstone testified that she was a freshman student at the University of Illinois; that she was walking south with witness Modjeski on the west side of First Street at the time of the collision and that she saw the taxicab when it was twenty or thirty feet south of the south curb line of First Street. She stated that the cab did not have lights and that she heard no horn blown prior to the crash; that the brakes were applied at the time of the crash.

George Pierce, a senior student at the College of Engineering at the University of Illinois, testified that he was walking south on the west side of First Street at the time Mrs. Young was struck by the taxicab; that he noticed the taxicab on First Street as it was entering the intersection; that when he first noticed the plaintiff, she was two or three feet on the west side of the center line of First Street and that she was walking straight east; that she stepped into the path of the taxicab and that she was struck by the left front side of the car; that he did not hear a horn sounded before the crash; that after the impact, the cab swerved toward the east curb; that prior to the crash, it was going straight north, parallel to the curb, that, in his opinion, the taxicab was traveling forty-five miles per hour, and that the lights were dim; that after the car struck the plaintiff, he heard the brakes applied; that she was lying probably ten feet north of the north line of Springfield Avenue; that the taxicab came to a stop one hundred and sixty or one hundred and seventy feet north of the north line of Springfield Avenue. When the witness first saw Mrs. Young she was about three feet west of the center line of First Street and was walking east.

Mary Rucker, a senior student at the University of Illinois, was also walking south on the west side of First Street at the time of the collision. She testified that she saw the taxicab ten or fifteen feet south of Springfield Avenue going north on First Street; that

the taxicab was going quite fast, and that Mrs. Young was walking slowly and was just a bit to the west of the center line of First Street going east; that it was just an instant until she saw the crash and saw Mrs. Young fall; that she heard no horn sounded and saw no other cars or cabs around the intersection; that the taxicab was going forty or forty-five miles per hour; that after the crash, the cab swerved to the right. In her judgment, the taxicab was closer to the center line than to the east curb line of First Street and the east side of the taxicab was seven or eight feet from the east curb line at the time of the impact. The witness did not remember seeing headlights on the cab.

The evidence shows that the plaintiff was unconscious from the time of the injury until the following day, and that she sustained severe bodily injuries including a bruised cut over the left eye, which caused a partial drooping of the lid; two jagged cuts at the back of her left knee, which required eighteen stitches to close; the large muscle at the back of the knee was cut entirely in two, and the tissues were torn loose from the bone; that she sustained several bruises and concussions, and that her body was practically black and blue; that she suffered great pain and still suffered some pain at the time of the trial; that her physician's bill amounted to \$72.00; that her hospital bill amounted to \$79.00; and that she was confined to bed for over three weeks.

A. E. Annzzolin, who was walking on the east side of First Street near Springfield Avenue, testified on behalf of the defendant that he saw the plaintiff when she was a few feet from the west curb of First Street and that she was walking east; that he saw the taxicab approaching from the south, and that as she was crossing the center line, the taxicab was about twenty feet away; that she took two or three steps and came in contact with the left side of the cab and was struck by the tire mount; that he noticed that the lights were on dim. He fixed the speed of the taxicab at about thirty or thirty-five miles per hour. He testified that he observed blood spots on the pavement between seven and ten feet from the east curb and some blood on and north of the expansion joint.

Joe Stone, also a University student, who was also walking south on the east side of First Street and was about thirty-five feet north of Springfield Avenue, testified that he looked up and saw Mrs. Young come in contact with the west side of the cab about three feet

behind the bumper; that she fell behind the cab as it passed; that he observed blood on the pavement about a foot north of the expansion joint and between five and eight feet west of the curb of First Street. In his judgment, Mrs. Young was north of the expansion joint at the time of the collision.

Louis Fiedler, also a student, testified that he was on the east side of First Street walking south at the time of the collision; that he happened to glance up and saw the plaintiff come in contact with the left side of the cab about three feet behind the front fender; that she fell about five feet north of the expansion joint; that after the car had passed, he observed her falling and when she completed falling, her head was to the east and her feet to the west and she was approximately two feet north of the expansion joint. In his opinion, the cab was traveling between thirty and thirty-five miles per hour.

None of the defendant's witnesses testified as to whether or not a horn was sounded.

Peter Palmisano, one of the defendants, testified that he was the driver of the cab which struck the plaintiff; that he had turned north on First Street, about two blocks south of the scene of the accident. His cab was equipped with head lights, but at the time of the accident they were on dim. He fixed his speed at thirty miles per hour at the time of the accident, and said that when he was one hundred and fifty feet south of Springfield Avenue, he looked to the northwest of First Street, and noticed no one; that he saw two boys fifty or sixty feet north of Springfield Avenue; that when he was forty or fifty feet from the south line of Springfield Avenue, he saw the plaintiff on the pavement, and that she was about thirty feet north of Springfield Avenue, and about five feet west of the center of First Street, and that she was walking east.

He further testified that he blew his horn; that Mrs. Young paused; that she was about in the center of the street when he was at the intersection; that after she paused, she continued walking, and that he turned his wheels to the east, and that Mrs. Young collided with the left side of the cab; that he then bumped the curb between twenty and thirty feet north of Springfield Avenue, and that after he bumped the curb, the steering of the car was hard, and that his lights were out. It was necessary to push the car to the garage of the company on First Street.

It is contended on the part of the defendants that the plaintiff was guilty of contributory negligence, and was

not in the exercise of due care for her own safety. The contentions may be summarized under two heads; namely, that it was negligence per se for the plaintiff to cross First Street at any point other than within a marked cross walk, being that portion of a roadway ordinarily included within the prolongation or connection at the lateral lines of sidewalks at intersections as defined in paragraph 116, Section 19, of Chapter 591½, Smith-Hurd Revised Statutes of 1935. Secondly, that she was negligent in not looking both ways in crossing the highway.

It is contended by the defendants that the plaintiff walked into the side of the taxicab while the plaintiff contends that she was struck by the left front end of the taxicab. A fair consideration of all the evidence would lead one to believe that the witnesses for the plaintiff, who were walking south on the west side of First Street were in a better position to see how, and in what manner, she was struck, than the witnesses for the defendants, who were on the east side of First Street, as the cab immediately after it struck the plaintiff, would be between the plaintiff and the witnesses and would obstruct their view.

The jury could well conclude from the evidence that plaintiff was within the crosswalk. Defendant Palmisano testified that after plaintiff collided with the taxicab, he struck the curb twenty to thirty feet north of Springfield Avenue, which would indicate that plaintiff was struck some place near the intersection. Two witnesses had previously testified that he did not swerve his car towards the curb until he struck the plaintiff. The Court, at the request of the defendants, submitted a special verdict to the jury, namely, "Was the plaintiff, Lillian Young, in crossing South First Street, at and just prior to the collision in question, within the cross walk line of the sidewalk along the north side of East Springfield Avenue?" The jury, by the special verdict, found that the plaintiff was within the cross walk at the time of the collision.

Plaintiff testified that she looked in both directions before she left the curb and again after she had gone eight or ten feet across First Street; that when she arrived at the center of the street, she looked north, and before she could look south, she was struck by the taxicab.

A number of the defendants' witnesses say that she paused while in the center of the street. Neither the plaintiff or any of the witnesses for the plaintiff, or

for defendants corroborated defendant Palmisano in his testimony that he blew his horn, while several witnesses testified that no horn was blown.

In *Plewe v. Chicago Motor Coach Co.*, 283 Ill. App., page 57, we said, "It is the duty of all persons operating automobiles or any other vehicle upon the public streets of a city, to use ordinary care in its operation, to move at a reasonable rate of speed, and cause it to slow up or to stop, if need be, where danger is imminent, and could by the exercise of reasonable care, be seen or known to avoid accident."

It is also the settled law of this State, that the question as to whether or not a person was guilty of contributory negligence is generally one of fact for the jury, and becomes a question of law, only when the evidence so clearly fails to establish due care, that all reasonable minds would reach the conclusion that there was contributory negligence.

Defendant Palmisano, by his own testimony, saw the plaintiff when she was five or six feet on the west side of the center of First Street, at the time he was forty or fifty feet from the south line of Springfield Avenue, which would place his automobile between eighty and ninety feet from the plaintiff. According to his testimony, his lights were on dim, and he was traveling thirty miles an hour, and sounded his horn. No other witness heard him sound his horn.

According to the plaintiff's witnesses, his speed was between forty and forty-five miles per hour. He continued at the same rate of speed.

After carefully considering the evidence that bears upon the question as to whether or not the plaintiff at, and just prior, to the time of the accident, was in the exercise of ordinary care, we have reached the conclusion that the jury was justified in finding that the plaintiff was not guilty of contributory negligence, and in view of the finding of the jury in their special verdict, we have also reached the conclusion that the jury was justified in finding the defendants guilty of negligence. Both questions being strictly questions of fact for the jury to decide from a consideration of all the evidence.

The driver of the taxicab testified that after the collision, he went over to the curb, and the impact of the taxicab against the curb broke off his battery cable and disconnected his light and ignition. The defendants offered to prove by a mechanic, that the steering apparatus was buckled and bent. It was urged that it

was reversible error for the court to refuse to admit this evidence. In the state of this record, we fail to see the materiality of this testimony.

The defendants offered to prove by the witness Annzolin, the location of the blood spots on the pavement, a week after the collision. The Court refused to permit proof by this witness that the blood stains on the pavement were in the same location a week after the accident as they were on the night of the accident. The defendants had proved the location of the blood spots on the morning after the accident and the location of the spots were in no manner controverted by the plaintiff.

Defendants earnestly contend that the Court erred in giving Instruction No. 7 for the plaintiff and in refusing a number of instructions offered by the defendant. Plaintiff's instruction No. 7 tells the jury in substance that if they believe from a preponderance of the evidence that there were no traffic control lights or stop lights in place, or in operation at the intersection of South First Street and East Springfield Avenue on the night of the collision in question and that the plaintiff was a pedestrian crossing the street at the intersection and that the plaintiff was using ordinary care and caution for her own safety, etc., it then became the duty of the defendant "to exercise due care to avoid injuring plaintiff at said time and place." This instruction does not undertake to set out the provisions of the statute concerning the rights and duties of the respective parties, and merely requires the exercise of due care and caution by both of them. The reference to stop or traffic lights is not based on any evidence, except the statement of defendant's engineer witness that no such signals nor stop lights were so located; hence the reference thereto could not have prejudiced either party. The instruction neither directs a verdict nor a finding on the issue of negligence or contributory negligence. The duty of the parties to exercise due care, and a definition of that term was also set out in other instructions of both plaintiff and defendant; hence in the opinion of this Court, the alleged error was harmless.

Defendants' refused instruction No. 1 undertook to set out the provisions of the statute concerning the right-of-way of vehicles over pedestrians in crossing a roadway at a point other than within a marked or unmarked crosswalk at a street intersection; defining the term "right-of-way," and, in substance, further instructing the jury that if they believed from the

evidence that the plaintiff crossed First Street at a point other than the crosswalk, and knew, or by exercising due care, should have known, that defendant's cab was approaching from the south before the collision in question, and that she could not cross safely before arrival of said cab; that then under the law of Illinois, defendant would have the right-of-way, and that it would be the duty of the plaintiff to yield to the defendant the privilege of the immediate use of such highway. This instruction ignores the duty of the defendant to exercise ordinary care, as well as the surrounding facts and circumstances shown by the evidence, and was properly refused. In the case of *Tuttle v. Checker Taxi Co.*, 274 Ill. App., 525, in passing upon a similar instruction given in a case predicated upon an ordinance of the City of Chicago, later repealed, this Court said:

"The instruction is also objectionable in that it in effect tells the jury that if plaintiff did not yield the right of way to defendants' cab and because of this was injured, she could not recover. It ignores the rule that both pedestrians and drivers of automobiles on the public streets are required by law to use care to avoid accidents. Drivers of automobiles on the streets must use ordinary care for the safety of pedestrians. The ordinance which was in force at the time of the accident provides that under like circumstances that the operator of a vehicle shall not be relieved from the duty to exercise due care." (Traffic Code of July 30, 1931, Art. IV, Sec. 15 (d); *Fickerle v. Seekamp*, 274 Ill. App., 310; *Hathaway v. Shannon*, 265 Ill. App., 600; *Chicago City Ry. Co. v. Tuohy*, 196 Ill. 410.)

"The instruction was also erroneous in that it did not tell the jury under what circumstances the automobile had the right of way. There might be a number of circumstances, such as the speed of the automobile, the gait at which plaintiff was walking, her distance away from the automobile at the time she was attempting to cross the roadway which would determine the right of the vehicle to proceed."

The same objection applies to defendants' refused instruction No. 2. Furthermore, at the instance of the defendant, an instruction was given requiring a separate verdict by the jury as to whether or not the plaintiff was within the line of the cross walk at the time of the alleged injury, which verdict was returned in the affirmative on that issue.

Not having offered any instruction correctly stating

the rule of law as to the provisions of the statute concerning relative rights and duties of pedestrians and vehicles upon crosswalks and upon the street between crosswalks, the defendant cannot complain on that ground.

Defendant's refused instruction No. 3 was a correct statement of the law applicable to the facts in this case but was covered in principle by given instruction No. 14. Instruction No. 4, as to the relative duties of the parties to exercise ordinary care, was also covered by other instructions herein. Instruction No. 5 simply undertook to repeat the rule as to contributory negligence set forth in several other instructions.

As to defendant's refused instruction No. 8, it is sufficient to say that no claim for damages for future pain and suffering was made in the complaint, and no evidence was offered thereon; hence this instruction is not applicable nor is it based upon the evidence.

Defendant's instruction No. 9 was properly refused because the complaint alleged future loss of earnings, and evidence was offered on that issue and it would have been improper to tell the jury in that state of the record that they could consider the amount of loss of wages or earnings, if any, from the date of the collision to the date of the trial and could not allow anything for such loss in the future. *The Chicago Union Tractor Co. v. Emil Chugrin*, 209 Ill., 429. The amount of the verdict was not excessive and was fairly responsive to the evidence.

The Court has examined both the abstract and the record relative to the ruling of the Court on argument of respective counsel to the jury and finds no prejudicial error therein.

Finding no reversible error in the record, the judgment of the lower court will be affirmed.

Judgment Affirmed.

(Twelve pages in original Opinion.)

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Date _____

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~~P. Flaherty~~ CFB 2151
~~122B~~ 736-6170
~~118 Williams~~ 236-6170

